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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1839

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appellee*

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	4
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
REASONS FOR NOTING JURISDICTION	9
(1) Constitutionality of State Taxation of Dividends Paid to a Resident Corporation Out of Foreign Source Earnings of Non-Resident Domestic and Foreign Corporations Having No Contacts with the Taxing State	9
(a) Due Process Clause	10
(b) Commerce Clause	12
(2) Constitutionality of State Taxation of Dividends Paid to a Resident Corporation Out of Domestic Source Earnings of Corporations Having No Contacts with the Taxing State	14
(a) Due Process Clause	14
(b) Commerce Clause	16
(3) Constitutionality of State Taxation of a Resident Corporation's Foreign and Domestic Source Interest Income from Investments and Capital Gains from the Sale of Stock and Securities Giving Rise to Dividend and Interest Income	18
(a) Due Process Clause	19
(b) Commerce Clause	19
CONCLUSION	21

Cases: Page

Am. Smelting & Refining v. Idaho St. Tax Com'n, 592 P.2d 39 (Idaho 1979) 1
Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 271 (1924) 11, 12
Butler Bros. v. McColgan, 315 U.S. 501 (1942) ...11, 15, 19
Champion International Corp. v. Bureau of Revenue, 88 N.M. 411, 540 P.2d 1300 (1975) 19
Chestnut Securities Co. v. Oklahoma Tax Commission, 125 F.2d 571 (10th Cir.), cert. denied, 316 U.S. 668 (1942) 12
Commonwealth v. ACF Industries, Incorporated, 441 Pa. 129, 271 A.2d 273 (1970) 19
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 12
Cox Broadcasting Corp. v. Cohn, 420 U.C. 469 (1975).. 3
F. W. Woolworth Co. v. Director of Div. of Taxation, 45 N.J. 466, 213 A.2d 1 (1965) 18
Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966) 11, 18
Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931) 12, 15
Japan Line, Ltd. v. County of Los Angeles, —— U.S. ——, (decided April 30, 1979) 13, 16
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) ... 12
Mobil Oil Corp. v. Commissioner of Taxes of Vermont, Sup. Ct. Docket No. 78-1201, jurisdiction noted May 14, 1979 .....*passim*
Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) ..4, 11, 12
Norfolk & Western Ry. Co. v. Missouri State Tax Commission, 390 U.S. 317 (1968) 12
People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 129 N.E. 202 (1920) 11, 19
Radio Station WOW v. Johnson, 326 U.S. 120 (1945).. 3
Sperry and Hutchinson Co. v. Department of Revenue, 270 Ore. 329, 527 P.2d 729 (1974) 19
Square D Co. v. Kentucky Board of Tax Appeals, 415 S.W.2d 594 (Ky. 1967) 18

Constitution of the United States:

Commerce Clause, Art. I, § 8 .....*passim*
Due Process Clause, Fourteenth Amendment .....*passim*

Statutes and Regulations: Page

Internal Revenue Code of 1954:
sections 243-245 17
sections 901-904 17
28 U.S.C. § 1257(a) 3
Idaho Code § 63-3027 .....4, 7, 8, 9, 10, 20
La. Rev. Stat. Ann. §§ 47:241-243 20
Mass. Gen. Laws Ann. Ch. 63, §§ 38(a), 39, 42A 20
Income Tax Assessment Act, 1936-1973, §§ 128A, 128B, and 221,YL 13
Income Tax Assessment Law of Mexico:
Articles 60 V, 61, 73 I, and 74 13
Article 65 .....13, 20

Treaties:

Income Tax Treaty between the United States and:

Australia (Article VII) 17
Austria (Article VI) 17
Belgium (Article 10) 17
Canada (Article XI) 17
Denmark (Article VI) 17
Finland (Article 12) 17
France (Article 9) 17
Germany (Article VI) 17
Iceland (Article 12) 17
Ireland (Article VI) 17
Italy (Article VII) 17
Japan (Article 12) 17
Luxembourg (Article IX) 17
Netherlands (Article VII) 17
New Zealand (Article VI(2)) 17
Norway (Article 8) 17
Pakistan (Article VI) 17
Poland (Article 11) 17
Romania (Article 10) 17
Sweden (Article VII) 17

Page

Switzerland (Article VI) 17
Trinidad and Tobago (Article 12) 17
United Kingdom (Article VI) 17

Pending Income Tax Treaty between the United States and:

Brazil (Article 12) 17
Hungary (Article 9) 17
Israel (Article 12) 17
Korea (Article 12) 17
Morocco (Article 10) 17
Philippines (Article 11) 17
Thailand (Article 9) 17
United Arab Republic (Article 11) 17

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v.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho is reported as *Am. Smelting & Refining* v. *Idaho St. Tax Com'm*, 592 P.2d 39 (Idaho 1979). Included as Appendix A are copies of that opinion (App. A, pp. 1-32); the unreported Memorandum of the District Court of the Fourth Judicial District of the State of Idaho, Ada County (the "State District Court") (App. A, pp. 33-34); the unreported Find-

ings and Conclusions of the State District Court (App. A, pp. 35-42); and the unreported Decision of the Idaho State Tax Commission (App. A, pp. 43-59).[1]

JURISDICTION

This proceeding involves the application of Idaho's corporate income tax statute. Appellant challenged the deficiencies asserted by the Idaho State Tax Commission on both statutory and constitutional grounds.[2]

Appellant's statutory arguments were upheld by the State District Court (App. A, pp. 33-34, 41-42) and, accordingly, that court did not reach the constitutional issues. In its March 12, 1979 decision, the Idaho Supreme Court reversed and held that certain dividends and other items of income were includable in Appellant's "business income" subject to tax in Idaho. (App. A, pp. 16-23) In addition to this business income issue, the Idaho Supreme Court also considered, but did not decide, a separate statutory question involving the three-factor formula used to determine the percentage of Appellant's business income to be apportioned to Idaho. (App. A, pp. 30-32) The

[1] The pages of the five appendices to this Statement have been separately bound and consecutively numbered. Where appropriate, references to a particular appendix will be followed by a page number indicating the location of the cited material in the appendices as a whole.

[2] Appellant raised the Federal constitutional issues on page 4 of its protest filed with the Idaho State Tax Commission, in paragraphs 3 and 4 of its Complaint filed in the State District Court and on pages 18-24 of the brief which it filed as Appellee in the Idaho Supreme Court.

Idaho Sureme Court therefore remanded the case to the State District Court to resolve this separate three-factor issue and to make the computations necessiated by the Idaho Supreme Court's decision with respect to the business income issue. (App. A, pp. 32) Included as Appendix B is a copy of the Remittitur of the Idaho Supreme Court, dated April 3, 1979.

In reversing the lower court with respect to the business income issue, the Idaho Supreme Court first rejected Appellant's statutory interpretation and then upheld the statute against Appellant's constitutional challenge. (App. A, pp. 23-30) The decision of the Idaho Supreme Court is final insofar as the constitutional questions presented here are concerned. The further proceedings on remand to the State District Court can neither affect these constitutional issues nor give rise to any additional Federal questions which could possibly be presented here. Because the decision below on the constitutional issues is final, that decision may now be appealed to this Court. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975); *Radio Station WOW* v. *Johnson,* 326 U.S. 120 (1945).

Included as Appendix C are copies of the Amended Notice of Appeal which Appellant filed in the State District Court on May 29, 1979, and the Amended Notice of Appeal which Appellant filed in the Idaho Supreme Court on the same date. This Jurisdictional Statement is being filed within 90 days of March 12, 1979, the date on which the Idaho Supreme Court rendered its decision upholding the constitutionality of the Idaho taxing statute as applied to the Appellant. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(2). *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* Sup. Ct. Docket No. 78-1201, juris-

diction noted May 14, 1979; *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978).

STATUTE INVOLVED

Section 63-3027 of the Idaho Code is set forth in Appendix D.

QUESTIONS PRESENTED

1. Whether a State may, consistently with the Commerce Clause of Article I, Section 8 of the Constitution of the United States and the Due Process Clause of the Fourteenth Amendment to the Constitution, tax, as part of a corporation's income from its business conducted within the taxing State, certain dividends received by that corporation where:

(a) The corporation is organized under the laws of another State and maintains its commercial domicile in still another State;

(b) the business activity of the corporation in the taxing State is limited to the operation and administration of certain mines and minor sales of secondary metals;

(c) the dividends are received outside the taxing State from investments managed, controlled, and physically located outside that State;

(d) the dividends are not needed to provide operating capital for the corporation's mining operations within the taxing State; and

(e) the dividends are paid out of foreign source earnings of the payor corporations.

2. Whether the answer to the first question is different where all factors are the same except that the income which the taxing State is attempting to tax consists of: (a) dividends paid out of domestic source earnings of the payor corporations; (b) foreign and domestic source interest received from investments in corporate debentures, notes, and other securities; or (c) foreign and domestic source capital gains from the sale of stock and securities giving rise to such dividend and interest income.

STATEMENT OF THE CASE

ASARCO Incorporated, the Appellant, is engaged in the business of mining, smelting, refining and selling non-ferrous metals. Appellant is incorporated in New Jersey, maintains its headquarters or "commercial domicile" in New York, and conducts business in a number of other states, including Idaho. Appellant's principal business in Idaho is mining silver. In addition, Appellant mines lead and zinc, operates the administrative office for its northwest mining division, and sells small amounts of secondary metals in Idaho. Appellant's smelting, refining and other activities are conducted elsewhere. (App. A, pp. 36-38; Stip. ¶¶ 12, 14) [3]

During the years in issue, 1968 through 1970, Appellant received sizeable dividends from a number of corporations at its commercial domicile in New York.[4]

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[3] "Stip." references are to the Stipulation filed in the State District Court proceeding.

[4] All corporate stocks, bonds and other evidences of indebtedness owned by Appellant are physically sited in New York. (Stip. ¶ 14) Appellant received $50,542,626 of dividends in 1968,

Some of the corporations paying the dividends were controlled by Appellant; others were independently managed. Some of the corporations engaged in activities outside the United States which generated foreign source earnings. In almost all instances, the parties stipulated that the corporations paying the dividends made no sales or purchases in Idaho, had no representatives or agents in Idaho, and conducted no business activity in Idaho during the years in issue. (App. A, pp. 35, 38-40; Stip. ¶ 9(a))[5]

Appellant's largest foreign source dividends came from M.I.M. Holdings, Ltd. (hereinafter "M.I.M.") which paid almost $64 million in dividends to Appellant during the three years in issue. M.I.M. is a major corporation engaged in mining, milling, smelting and refining in Australia and in England. Appellant owned 53% of the stock of M.I.M. in 1968 and 52.7% in 1970, with the balance of the stock being widely held. M.I.M. operates entirely independently of and has minimal contact with Appellant. (App. A, p. 40; Stip. ¶¶ 5, 11; Tr. 69-73)[6] Appellant's largest dividends from domestic sources, totalling over $13 million during the three years in issue, were received from General Cable, an independent, publicly-owned corporation. Appel-

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$69,519,428 in 1969, and $64,762,970 in 1970. A schedule of these dividends, taken from paragraph 11 of the Stipulation, is set forth in Appendix E.

[5] In a few instances, no information was available with respect to the sales and business activities of the payor corporations in Idaho. (Stip. ¶ 9(b)) There was no evidence or assertion, however, that any of the corporations did conduct business in Idaho.

[6] "Tr." references are to the Reporter's Transcript of the State District Court proceeding.

lant owned approximately 34% of General Cable's stock during the years in issue until the stock was sold in 1970.[7] (App. A, p. 40; Stip. ¶¶ 5, 6, 11; Tr. 73-76)

In addition to its dividend income, Appellant received interest income at its New York commercial domicile from investments in corporate debentures, notes from the sale of stock investments, and other marketable securities. During the years in issue, Appellant also received capital gains from the sale of M.I.M. stock, General Cable stock, and other securities.[8] The disposition of the dividend, interest and capital gain income was determined by Appellant outside Idaho, and, in each instance, the income was not needed to provide working capital in Appellant's mining operations. (App. A, pp. 37-38)

In filing its Idaho tax return for 1969 and 1970, Appellant apportioned its operating business income between sources within and without Idaho on the basis of the three-factor formula prescribed pursuant to Idaho Code § 63-3027. (See App. D, pp. 67-69)[9] This three-factor formula attributed to Idaho that fraction of Appellant's total "business income" which was the average of the fractions of Appellant's total tangible property, payroll, and sales attributable to Idaho. Appellant believed that all of its dividend income, some

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[7] Appellant made sales to General Cable. But, there was no significant change in the sales pattern after Appellant sold its General Cable stock. (Stip. ¶ 4; Tr. 76)

[8] A schedule of the interest income and capital gains, taken from paragraph 11 of the Stipulation, is set forth in Appendix E.

[9] For 1968, Appellant reported its Idaho tax using a separate accounting, rather than an apportionment, method. (Stip. ¶ 3)

of its interest income and all of its capital gains constituted non-business income.[10] Accordingly, instead of including these amounts in its apportionable income, Appellant allocated them to New York, its commercial domicile, pursuant to Idaho Code § 63-3027 (f)(3) and (g). (App. D, pp. 65-66) As a result, Appellant's Idaho taxable income for 1968 and 1969 was reported as $419,876 and $127,775, respectively. (Tr. 130)

On audit, the Idaho State Tax Commission determined that all of Appellant's dividend, interest and capital gain income was includible in its apportionable business income. Because of the large amounts involved (see Appendix E), this adjustment increased Appellant's Idaho taxable income to $2,274,750 in 1969 and $2,162,340 in 1970. (App. A, p. 36)

Appellant challenged the inclusion of the dividend, interest and capital gain income in its apportionable business income on both statutory and constitutional grounds. The Idaho State Tax Commission rejected both of these challenges. (App. A, pp. 50-58) As indicated above, the State District Court upheld Appellant's statutory argument without reaching the constitutional issues (App. A, pp. 33-34, 41-42), and the Idaho Supreme Court reversed, rejecting most of Appellant's statutory arguments (App. A, pp. 9-23) and

[10] Appellant also believes that its income from rents and royalties should not be included in apportionable business income. (App. A, pp. 41-42) However, in view of the relatively small amounts involved, Appellant has decided not to appeal from the Idaho Supreme Court's decision to include these items in apportionable income. (App. A, p. 21)

all of its constitutional arguments (App. A, pp. 23-30).[11]

REASONS FOR NOTING JURISDICTION

This case involves several substantial Federal questions. The first is whether a State may constitutionally tax dividends paid to a resident corporation out of foreign source earnings of non-resident corporations having no contact with the taxing State.[12] That precise issue is presently before this Court in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, supra.* The Court should note jurisdiction in the present case in order to further consider that issue in light of the circumstances of this case, and to consider the additional and closely-related issues which are raised here.

(1) Constitutionality of State Taxation of Dividends Paid to a Resident Corporation Out of Foreign Source Earnings of Non-Resident Domestic and Foreign Corporations Having No Contacts with the Taxing State.

Insofar as Appellant's foreign source dividend income is concerned, this case involves the same constitutional questions as are presented in the *Mobil* case, *supra.* Each case draws into question the con-

[11] The Idaho Supreme Court did hold that a small portion of Appellant's dividend income constituted non-business income which was not subject to apportionment under the Idaho Code. (App. A, p. 20)

[12] As used herein, the term "resident" corporation means a corporation which is doing business within the taxing State, but is organized under the laws of some other State and has its headquarters or commercial domicile in some other State. The term "domestic" corporation means a corporation organized under the laws of one of the States, and the term "foreign" corporation means a corporation organized under the laws of a foreign country.

stitutionality of a State income tax imposed on dividends paid to a resident corporation by non-resident domestic or foreign corporations which derive their income from foreign sources and have no contacts of any kind with the taxing State. In this case, Idaho seeks to tax foreign source dividends received by Appellant at its commercial domicile in New York from sources in Australia, Mexico, Chile and Peru.[13]

(a) *Due Process Clause.* As was the case with Vermont in *Mobil,* Idaho seeks, contrary to the Due Process Clause, to tax Appellant's extraterritorial dividend income through the guise of purporting to measure (by apportionment) the income attributable to Appellant's mining and sales activities conducted within Idaho. However, the requisite nexus between Appellant's investment and holding company activities at its commercial domicile in New York and its business activities in Idaho is missing. Based on a statutory presumption,[14] the Idaho Supreme Court reversed the State District Court and held that Appellant's foreign source dividend income in issue here constituted "business income" subject to apportionment. (App. A, pp. 17-20) But the statutory presumption relied upon by the Idaho Supreme Court should not enable Idaho to treat Appellant's mining and sales activities (which generate operating revenue) and its investment and holding company activities (which generate dividend

[13] The Idaho Supreme Court apportioned Appellant's foreign source dividends from M.I.M., ASARCO Mexicana, S.A., Compania American Smelting, S.A. (all foreign corporations) and Southern Peru Copper Corporation (a domestic corporation). These four corporations operated in Australia, Mexico, Chile, and Peru, respectively. (App. A, pp. 19-20; Tr. 37, 55, 65, 69)

[14] See Idaho Code § 63-3027(a)(1). (App. D, p. 63)

income) as all being part of a single unitary business conducted both within and without Idaho.[15] Thus, this case is distinguishable from cases such as *Moorman Mfg. Co.* v. *Bair, supra; Butler Bros.* v. *McColgan,* 315 U.S. 501 (1942); and *Bass, Ratcliff & Gretton* v. *State Tax Commission,* 266 U.S. 271 (1924), all of which involved truly unitary businesses of one corporation.

Alternatively, even if there were some basis for including Appellant's foreign source dividend income in its apportionable income in order to determine Appellant's income from its business activities in Idaho, the result reached under the Idaho statute would still contravene the Due Process Clause. As the State District Court found below, that result apportions arbitrarily to Idaho an amount "which does not reflect and greatly exceeds an amount which would accurately reflect Plaintiff's business in Idaho." (App. A, pp. 40-41)[16] Such a result is impermissible under the Due

[15] M.I.M., for example, operated entirely independently of Appellant. (App. A, p. 40) Southern Peru Copper Corporation, by comparison, does business with Appellant. But the record indicates that this business is conducted on an arms' length basis and that the income effect of these contacts, insofar as Appellant is concerned, is fully reflected in Appellant's operating revenues and need not also be taken into account through Appellant's dividend income. (Tr. 59-63) The same is also true with respect to the other subsidiaries which do business with Appellant. See *Gulf Oil Corp.* v. *Clayton,* 267 N.C. 15, 147 S.E.2d 522 (1966).

[16] This results, in part, from Idaho's arbitrary attempt to include over $100 million of dividends in apportionable business income during the years in issue (see App. E) while, at the same time, failing to make consistent or correlative adjustments to the three-factor apportionment fraction to reflect Appellant's investment in the subsidiaries paying the dividends, or Appellant's pro rata share of the property, payroll, and sales of those subsidiaries. See *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N.Y.

Process Clause. *Hans Rees' Sons, Inc.* v. *North Carolina ex rel Maxwell,* 283 U.S. 123 (1931); *Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission,* 390 U.S. 317 (1968). See *Moorman Mfg. Co.* v. *Bair, supra.* This alternative issue (involving the relationship between the determination of the apportionable business income base and the apportionment fraction) is not raised in Mobil's Jurisdictional Statement, and thus constitutes an additional reason for noting jurisdiction in this case.

(b) *Commerce Clause.* Idaho's statute as applied here by the Idaho Supreme Court also contravenes the Commerce Clause. As in *Mobil,* Appellant contends that the statute places an impermissible burden on foreign commerce by (1) taxing an activity (*viz.,* the investment in corporations operating abroad and the receipt of foreign source dividends) which lacks a substantial nexus to Idaho, (2) discriminating against foreign commerce by subjecting it to the risk of multiple taxation by the States,[17] and (3) impairing Federal uniformity in regulating commercial relations with foreign governments. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977); *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276 (1976). In addition to these infirmities, which are also involved in the *Mobil* case, the

48, 129 N.E. 202 (1920), per Cardozo, J. This point was noted, but not passed upon, in *Bass, Ratcliff & Gretton* v. *State Tax Commission, supra,* 266 U.S. at 284-285.

[17] As is explained in detail in Mobil's Jurisdictional Statement (pp. 16-19), apportioning the dividends as business income creates a risk of multiple taxation by the States since the dividends also are fully allocable to the State of commercial domicile. See, e.g., *Chestnut Securities Co.* v. *Oklahoma Tax Commission,* 125 F.2d 571 (10th Cir.), *cert. denied,* 316 U.S. 668 (1942).

risk of impermissible multiple taxation is even more dramatically presented in this case since Idaho's tax "creates more than the *risk* of multiple taxation; it produces multiple taxation in fact." *Japan Line Ltd.* v. *County of Los Angeles,* —— U.S. —— (decided April 30, 1979). Appellant was subject to Mexican and Australian withholding taxes on the dividends which it received from corporations operating in those countries.[18] The decision below allows Idaho to impose a second tax on the same dividend income. Appellant submits that this "double tax" is unconstitutional. *Japan Line Ltd.* v. *County of Los Angeles, supra.*

Because the taxation of foreign source dividend income of resident corporations was discussed at length in Mobil's Jurisdictional Statement, and because the Court has already agreed to hear that case on the merits, Appellant assumes that further discussion of the importance of this issue is neither necessary nor appropriate in the present case at this juncture. However, because this case involves considerations which appear not to be involved in *Mobil,* Appellant believes that it could make a significant additional contribution to the Court's understanding and resolution of the issue by filing a brief on the merits and presenting oral argument.

[18] The Income Tax Law of Mexico (Articles 60, V and 73, I) subjected such dividends to a tax which was imposed on the recipient (Article 61), but was withheld by the payor (Article 74). Similarly, Australia imposed a withholding tax (Income Tax Assessment Act, 1936-1973, Secs. 128A and 128B) on dividend payments by resident companies to non-residents, and required the payor company to withhold the tax before the dividend was paid (Income Tax Assessment Act, 1936-1973, Sec. 221,YL).

(2) Constitutionality of State Taxation of Dividends Paid to a Resident Corporation Out of Domestic Source Earnings of Corporations Having No Contacts with the Taxing State.

In the *Mobil* case, over 99% of the dividend income at issue in the State court proceedings was paid to Mobil by corporations "deriving all, or all but an insignificant portion, of their income from sources outside the United States."[19] Mobil's Jurisdictional Statement in this Court confined the Questions Presented to situations involving dividends "derived from foreign source earnings of the payor corporations."[20] The two Argument headings in the Jurisdictional Statement referred to "Foreign Source Dividends" and "Dividends Paid Out of Foreign Earnings."[21] Thus, the only issue before this Court in the *Mobil* case is the constitutionality of State income taxes imposed on the foreign source dividend income of a resident corporation.

In addition to raising that issue, the present case raises the related question as to whether a State may constitutionally tax dividends paid to a resident corporation out of the *domestic* earnings of a corporation having no contacts of any kind with the taxing State.[22]

(a) *Due Process Clause.* Insofar as the Due Process Clause is concerned, Appellant believes that a State

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[19] *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, Sup. Ct. Docket No. 78-1201, Jurisdictional Statement p. 5.

[20] *Id.*, p. 2.

[21] *Id.*, pp. 9, 11.

[22] The Idaho Supreme Court apportioned Appellant's U.S. source dividends from General Cable and Revere Copper and Brass. (App. A, p. 19; Tr. 73)

has no more constitutional authority to tax dividends paid to a resident corporation at its commercial domicile by corporations operating in other States than it does to tax dividend income received at the commercial domicile from corporations operating in foreign countries. The State's asserted tax operates equally in both instances "to reach profits which are in no just sense attributable to transactions within its jurisdiction." *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell, supra,* 283 U.S. at 134. In each instance, the State is clearly seeking to extend its tax to reach "extraterritorial values." *Butler Bros.* v. *McColgan, supra,* 315 U.S. at 507.

Appellant's Idaho mining business has no more association with Appellant's domestic source dividend income than with its foreign source dividend income. For example, during 1968-1970, the taxable years at issue here, Appellant received sizeable dividends from both M.I.M. and General Cable at its commercial domicile in New York. Both of these companies were publicly-held, independently managed mining or manufacturing concerns with no asserted business contacts of any kind in Idaho. In each instance, Appellant's investment in the companies was managed and administered entirely from outside Idaho, and none of the dividends which Appellant received were needed for reinvestment in Appellant's Idaho mining operations. (App. A, pp. 38, 40) Since Idaho's jurisdiction to tax Appellant rests solely on the fact that Appellant operates a mine in Idaho and conducts related business there, Idaho's ability to reach out and tax Appellant's dividend income from unrelated out-of-state enterprises is surely no greater in the case of General Cable than in the case of M.I.M. merely because the

former company operates in the United States whereas the latter operates in Australia. Dividend income earned and sourced in New England is just as far beyond the taxing jurisdiction of Idaho as dividend income from Australia.

(b) *Commerce Clause.* This Court's most recent decision in the State tax area makes it clear that, under the Commerce Clause, the constitutional restraints on State taxation are greater where foreign commerce is involved than they are where the commerce is solely among the States. See *Japan Line, Ltd.* v. *County of Los Angeles, supra.* The present case affords an excellent opportunity to test the limits of that concept, and to determine whether it also applies where a State seeks to tax both the domestic and foreign source dividends of a resident corporation.

Appellant contends that the Commerce Clause prohibition against multiple taxation of domestic source dividends arising out of interstate commerce is no less than the prohibition against multiple taxation of foreign source dividends arising out of foreign commerce. It is true that foreign source dividends present a greater opportunity for multiple taxation since, as is the case here, these dividends are frequently subject to foreign withholding taxes. However, the risk of multiple taxation of domestic source dividends by the various States, as a consequence of both apportionment and the ability of the State of commercial domicile to tax the dividends in full, is sufficient to constitute an impermissible burden on interstate commerce.

It is also true that the United States has entered into treaties which provide for a reduction in the normal rate of foreign withholding tax on dividends

paid to U.S. investors,[23] and that Congress has provided for a foreign tax credit to eliminate, or at least reduce, the double taxation of foreign source dividend income at the Federal level.[24] But Congress has also taken comparable action to avoid double taxation of domestic inter-company dividend income at the Federal level by providing for an 85 or 100 percent dividends received deduction.[25] Thus, it appears that multiple taxation of domestic dividends is regarded as imposing no less significant a burden on interstate commerce than comparable multiple taxation of foreign source dividends imposes on foreign commerce.

Having already decided to resolve the constitutional status of foreign source dividend income, this Court

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[23] See the Income Tax Treaties between the United States and: Australia (Article VII); Austria (Article VI); Belgium (Article 10); Canada (Article XI); Denmark (Article VI); Finland (Article 12); France (Article 9); Germany (Article VI); Iceland (Article 12); Ireland (Article VI); Italy (Article VII); Japan (Article 12); Luxembourg (Article IX); Netherlands (Article VII); New Zealand (cf. Article VI(2)); Norway (Article 8); Pakistan (Article VI); Poland (Article 11); Romania (Article 10); Sweden (Article VII); Switzerland (Article VI); Trinidad and Tobago (Article 12); and United Kingdom (Article VI). Similar provisions are contained in a number of treaties which have been signed, but not yet ratified. See the pending United States income tax treaties with Brazil (Article 12); Hungary (Article 9); Israel (Article 12); Korea (Article 12); Morocco (Article 10); Philippines (Article 11); Thailand (Article 9); and United Arab Republic (Article 11). The text of all of the foregoing treaties may be found in the Commerce Clearing House, Inc. and Prentice-Hall, Inc. Tax Treaties services. Treaties in force are also reproduced in the Department of State multi-volume publication entitled "United States Treaties and Other International Agreements."

[24] See Internal Revenue Code of 1954, sections 901-904.

[25] See Internal Revenue Code of 1954, sections 243-245.

should not leave the status of domestic source dividend income unresolved. As matters now stand, there is a clear-cut split of authority among State courts on the question of whether a State may constitutionally tax a resident corporation on dividends received from corporations operating entirely within other States. Compare, e.g., *Square D Co.* v. *Kentucky Board of Tax Appeals,* 415 S.W. 2d 594 (Ky. 1967) and *Gulf Oil Corp.* v. *Clayton,* 267 N.C. 15, 147 S.E. 2d 522 (1966) holding such taxation of dividends to be unconstitutional, with *F. W. Woolworth Co.* v. *Director of Div. of Taxation,* 45 N.J. 466, 213 A.2d 1 (1965) and the decision below holding such taxation of dividends to be constitutional. A definitive resolution of this issue is extremely important because at least 26 States and the District of Columbia presently assert taxing jurisdiction in such cases,[26] and the potential tax revenues are enormous.

(3) Constitutionality of State Taxation of a Resident Corporation's Foreign and Domestic Source Interest Income from Investments and Capital Gains from the Sale of Stock and Securities Giving Rise to Dividend and Interest Income.

Mobil involves only dividend income; the present case also involves interest income from investments and capital gains from the sale of securities giving rise to dividend and interest income. Appellant derived such interest income and capital gains from both foreign and domestic sources. (See, App. E)

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[26] The States asserting jurisdiction to tax, and the relevant statutory provisions, are listed in Appendix F to Mobil's Jurisdictional Statement.

(a) *Due Process Clause.* There are many cases in which State courts have considered whether a resident corporation's interest income or capital gains from intangibles are sufficiently related to the corporation's activities within the taxing State to justify apportionment. See, e.g., *People ex rel. Alpha Portland Cement Co.* v. *Knapp, supra; Champion International Corp.* v. *Bureau of Revenue,* 88 N.M. 411, 540 P.2d 1300 (1975); *Sperry and Hutchinson Co.* v. *Department of Revenue,* 270 Ore. 329, 527 P.2d 729 (1974); and *Commonwealth* v. *ACF Industries, Incorporated,* 441 Pa. 129, 271 A.2d 273 (1970). By noting jurisdiction, this Court has the opportunity to consider this question and determine whether the tests to be applied with respect to dividends also apply equally to interest and capital gains.

Appellant contends that the result under the Due Process Clause should be the same since, in each instance, Idaho is making the same impermissible attempt to tax "extraterritorial values." *Butler Bros.* v. *McColgan, supra* at 507. Appellant's domestic source interest from its Revere Copper and Brass debentures (App. E, p. 72), its foreign source interest from the notes it received on a prior sale of ASARCO Mexicana, S.A. stock (App. E, p. 72; Tr. 66), and its foreign source capital gain from the sale of M.I.M. stock (App. E, p. 73), were no more related to Appellant's business conducted in Idaho than Appellant's dividend income from those same companies. All of the income was received outside of Idaho as a consequence of decisions and actions taken outside of Idaho and none of it was needed for the mining business conducted within Idaho. (App. A, pp. 37-38)

(b) *Commerce Clause.* The issues relating to interest and capital gain income under the Commerce Clause are also comparable to the issues relating to dividend income. In particular, there is the same potential for multiple taxation—both as a result of foreign withholding taxes [27] and as a result of the diverse methods employed by the States in allocating or apportioning income. As with dividends, some States (e.g., Louisiana) fully allocate interest and capital gain to the State of commercial domicile; some States (e.g., Massachusetts) fully apportion interest and capital gain income (whether business or non-business); and some States (including Idaho) allocate non-business interest and capital gains while apportioning business interest and capital gains.[28]

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[27] See, e.g., Income Tax Law of Mexico, Article 65 with respect to the interest on the notes received by Appellant in connection with the sale of its ASARCO Mexicana, S.A. stock.

[28] La. Rev. Stat. Ann. §§ 47:241-243; Mass. Gen. Laws Ann. Ch. 63, §§ 38(a), 39, 42A; Idaho Code § 63-3027(a), (f)(3), (g).

CONCLUSION

This case presents the same constitutional issues as the *Mobil* case. For that reason alone, this Court should note probable jurisdiction so that similarly situated taxpayers will receive equal treatment. In addition, this case also raises significant related issues not presented by *Mobil*. Accordingly, probable jurisdiction should be noted, and this case should be scheduled for plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1839

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appellee.*

On Appeal from the Supreme Court of Idaho

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDICES

INDEX

Page

APPENDIX A:

Decision of the Supreme Court of Idaho 1

Memorandum of the State District Court 33

Findings and Conclusions of the State District Court 35

Decision of the Idaho State Tax Commission 43

APPENDIX B:

Remittitur of the Supreme Court of Idaho 60

APPENDIX C:

Amended Notice of Appeal Filed in the State District Court on 5/29/79 61

Amended Notice of Appeal Filed in the Supreme Court of Idaho on 5/29/79 62

APPENDIX D:

Idaho Code, § 63-3027 63

APPENDIX E:

Schedules of Dividend, Interest and Capital Gain Income Extracted from Paragraph 11 of Stipulation Filed in the State District Court 71

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12198

Boise term, December 1977

Filed: March 12, 1979

AMERICAN SMELTING & REFINING CO., *Plaintiff-respondent,*

v.

IDAHO STATE TAX COMMISSION, *Defendant-appellant.*

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Marion J. Callister, District Judge.

Appeal from apportionment of income for Idaho state income tax purposes. *Reversed and remanded.*

David Leroy, Attorney General; Theodore V. Spangler, Jr., Deputy Attorney General for State Tax Commission, Boise, Idaho, for appellant.

Philip E. Peterson, Lewiston, Idaho; R. Michael Southcombe, of Clemons, Cosho & Humphrey, Boise, Idaho; and George Beatty, of Lee, Toomey & Kent, Washington, D.C., for respondent.

William D. Dexter, Olympia, Washington, for amicus curiae Multistate Tax Commission.

Dale G. Higer, of Eberle, Berlin, Kading, Turnbow & Gillespie, Boise, Idaho, for amicus curiae United States Steel Corporation.

BAKES, J.

This appeal involves state income tax deficiencies assessed against the plaintiff respondent American Smelting

and Refining Company (ASARCO) by the defendant appellant Idaho State Tax Commission (Commission). The principal issues concern the apportionment of ASARCO's income from tangible and intangible property as "business income" under the Idaho version of the Uniform Division of Income for Tax Purposes Act (UDITPA).

I

THE FACTUAL BACKGROUND

In 1965 Idaho adopted with slight modification the Uniform Division of Income for Tax Purposes Act (UDITPA). I.C. § 63-3027. The Act contains rules for determining the portion of a corporation's total income from a multistate business which is attributable to this state and therefore subject to Idaho's income tax. In general, UDITPA divides a multistate corporation's income into two groups: business income and non-business income. Business income is apportioned according to a three factor formula, I.C. § 63-3027(i), while non-business income is allocated to a specific jurisdiction. I.C. § 63-3027(d)-(h). Idaho modified UDITPA to provide that "a parent and subsidiary corporation may, when necessary to accurately reflect income, be considered a single corporation." I.C. § 63-3027(s).

ASARCO is a multistate-multinational corporation primarily engaged in mining, smelting and refining nonferrous metals. ASARCO owns stock in several domestic and foreign corporations, most of which are engaged in similar or related operations. ASARCO's commercial domicile is in New York. Its Idaho activities include the operation of two mines, the Page Lead Zinc Mine and the Galena Silver Mine, and the location of its northwest mining department headquarters in Wallace, Idaho. ASARCO also sells in Idaho small amounts of secondary metals—metals reclaimed from scrap metal.

In 1971 the Multistate Tax Commission (MTC) completed a joint audit of ASARCO on behalf of Idaho and five other states. The MTC is the administrative agency of the Multistate Tax Compact, of which Idaho is a member. I.C. § 63-3701. Article VIII of the compact authorizes the MTC to perform interstate audits on behalf of member states. Idaho statutes specifically authorize the Idaho State Tax Commission to participate in such joint audits. I.C. § 63-3707. The constitutionality of the Multistate Tax Compact, including its joint audit provisions, has been upheld. United States Steel Corp. v. Multistate Tax Comm'n, —— U.S. ——, 98 S.Ct. 799 (1978); Kinnear v. Hertz Corp., 545 P.2d 1186 (Wash. 1976).

The MTC auditor made several significant adjustments in the computation of ASARCO's Idaho tax returns for the years of 1968, 1969 and 1970. These adjustments, which were accepted by the Idaho State Tax Commission, resulted in the tax deficiencies at issue in this case. These adjustments may be summarized as follows.

The MTC auditor combined or "unitized" with ASARCO, pursuant to I.C. § 63-3027(s), six corporations—all wholly owned subsidiaries of ASARCO.[1] Because these corporations were unitized with ASARCO, their incomes were combined with ASARCO's for Idaho tax purposes. However, dividends paid by the six corporations to ASARCO were not considered as income to ASARCO but were viewed by the auditor as intracompany transfers.

The MTC auditor also made significant changes in the computation of ASARCO's "business income," which was subject to apportionment. I.C. § 63-3027(i). These changes are best summarized in terms of the type of income involved.

---

[1] The "unitized" corporations were: Federal Metals of Canada; ASARCO Mercantile Co.; Enthone, Inc.; International Metal Co.; Lone Star Lead Construction Co.; and Northern Peru Mining Co.

Dividend Income: From a monetary standpoint, this is the most significant of the disputed items of income. The MTC auditor included as business income dividends paid ASARCO by various corporations, other than the six "unitized" corporations. The dividends from these "non-unitized" corporations totaled $48,310,126.00 in 1968, $66,374,-428.00 in 1969, and $61,772,970.00 in 1970. This dividend income represented a substantial portion of ASARCO's total income for the tax years in question. Summarized below are the activities of the principal corporations which paid ASARCO these dividends and their relationship to ASARCO.

1. Southern Peru Copper Corporation: This corporation produces blister copper, a material which is 99% copper and also contains byproduct material such as gold, silver and florium. ASARCO owns 51.5% of the stock and the remainder is owned by three other mining companies. Pursuant to a management agreement, ASARCO is entitled to elect a plurality but not a majority of the directors. Southern Peru has its own staff, but ASARCO provides certain technical assistance such as purchasing, traffic and tax preparation services. ASARCO receives a negotiated fee for these services.

Approximately 30% of Southern Peru's blister copper is sold to European customers through Southern Peru Copper Sales Corporation. The stock ownership in this sales corporation is the same as in Southern Peru. However, it is staffed entirely by ASARCO employees. The European sales are made through the sales corporation in order to preserve Southern Peru's favored federal tax status as a Western Hemisphere Trading Corporation. The remainder of Southern Peru's blister copper is divided among the four stockholders according to their ownership, *e.g.*, ASARCO receives 51.5% of the remainder. The price for the copper is determined by reference to a quotation in a trade publication, and during the years in

question ASARCO's purchases from Southern Peru were substantial. This output contract with Southern Peru is important to ASARCO but is not essential to its smelting business.

2. M.I.M. Holdings, Ltd.: This is a major corporation engaged in the mining, milling, smelting and refining of copper, lead, zinc and silver in Australia and which also operates a lead and zinc refinery in England. Hence, it is involved in virtually the same business as ASARCO. ASARCO owns 52.7% of the stock, and the rest is widely held. However, ASARCO has no directors or officers in M.I.M. At trial an ASARCO executive explained its failure to elect any directors as follows:

> "This company has been very successful in staffing the corporation with Australian people and [they have] been able to run this company by themselves and, therefore, in consequence of the nationalistic feeling which develops in most of such developing countries we have not exercised any right we might have to elect a director to the board of the company."

M.I.M. uses an ASARCO furnace patent, for which it pays a royalty, and occasionally ASARCO provides it some technical services. It is not economically feasible to ship ore or concentrates from Australia to the United States for smelting and there is only an insignificant amount of sales between these two corporations. In general, M.I.M. operates independently of ASARCO.

3. General Cable and Revere Copper: These two copper fabricators are major customers of ASARCO and ASARCO owned approximately 34% of the stock in each corporation. The remaining stock was widely held. Revere Copper also uses an ASARCO patent, for which it pays royalties, and both companies utilize ASARCO's stock transfer department, for which they pay a fee. In 1961 the United States Department of Justice filed an antitrust

action against ASARCO because of its interest in General Cable and Revere Copper. The action resulted in consent decrees signed in 1967 which prohibited ASARCO from maintaining common officers in these companies, voting its stock, selling these companies copper at prices lower than those quoted their competitors, and acquiring stock in any other copper fabricator. In 1970 ASARCO was compelled to divest itself of its stock in General Cable. Following the divestiture, General Cable continued to be a major customer of ASARCO.

4. Lake Asbestos of Quebec, Ltd.: This company mines and processes asbestos fibers in Canada. Its products are sold throughout the world, and in order to preserve its status as a Western Hemisphere Trading Corporation its sales are made through a conduit corporation, ASARCO International Corporation. Both Lake Asbestos and ASARCO Intl. are wholly owned by ASARCO. Lake Asbestos has its own staff, but ASARCO provides important management services. Lake Asbestos seeks ASARCO's direction and approval on major policy decisions. ASARCO Intl. is staffed entirely by ASARCO and Lake Asbestos employees. The business activities and operations of Lake Asbestos and ASARCO Intl. are in a field unrelated to ASARCO's mining and smelting operations and involve different technology. ASARCO shared no facilities, customers or sales force with these companies and it did not purchase any of their products.

5. ASARCO Mexicana, S.A.: This company mines and smelts lead and copper in Mexico. ASARCO owns 49% of the stock and the remainder is publicly held by Mexican nationals. At one time ASARCO owned 100% of the company, but in 1965 was required by Mexican law to divest itself of 51% of the stock. ASARCO Mexicana does not seek approval from ASARCO concerning major policy decisions, but ASARCO does provide technical services, makes some direct purchases from ASARCO Mexicana, and

acts as its agent for sales outside Mexico. ASARCO Mexicana pays ASARCO for those services.

6. Compania American Smelting, S.A.: This is a small company which purchases ore in Chile for ASARCO smelters. It is wholly owned by ASARCO and paid ASARCO small dividends in 1968 and 1969.

7. Hecla Mining Co., Kennecott Copper Co., Phelps-Dodge and United Park City Mines: These are four mining companies in which ASARCO owns a very small percentage of the stock. ASARCO exercises no control over these corporations and they made only minimal sales to ASARCO.

Interest Income: ASARCO received interest income from a variety of sources, including customers' notes and bonds, notes taken in connection with the sale of an Illinois plant and the sale of General Cable stock, and time certificates, bankers' acceptances and commercial paper notes. In its brief ASARCO indicates that it originally reported only its interest income from trade accounts receivable as business income. The MTC auditor, however, classified all of the foregoing interest income as business income.

Rents: ASARCO's rental income, which the auditor considered business income, was for the most part derived from homesites rented to employees working near ASARCO mines and plants.

Royalties: ASARCO earned royalties from leases to third parties of a portion of its mineral land, and from licenses to third parties of patents developed by ASARCO and used in ASARCO's business. The MTC auditor considered these royalties as business income.

Capital gains and losses: ASARCO realized gains on the disposition of three categories of assets: fixed assets, notes and bonds, and securities. The fixed assets were used in ASARCO's everyday business activities. The notes and bonds consisted of United States Treasury notes and bonds

and state and municipal notes and bonds. They were primarily acquired with idle cash in order to earn a return while the funds were not needed in ASARCO's business operations and they were generally held less than a year. The securities were in ASARCO subsidiaries and General Cable. The gains and losses realized from the disposition of these assets were all considered as business income by the MTC auditor.

The MTC auditor also made an alteration in the computation of the three factor formula used to apportion ASARCO's business income. UDITPA provides for the computation of a ratio of the taxpayer's property, payroll and sales in Idaho to its property, payroll and sales everywhere. This ratio, the Idaho apportionment factor, is applied to the taxpayer's total business income and the result is the portion of the taxpayer's business income attributable to Idaho and subject to its income tax. I.C. § 63-3027(i)-(q). In computing the denominator—the everywhere portion—of the sales factor, ASARCO included the value of some ore transferred from its mines in Idaho to its smelter in Montana. However, ASARCO did not include those transfers in the numerator of the sales factor in either Idaho or Montana, which is also a member of the multistate compact and participated in the joint audit. The MTC auditor included those transfers in the numerator of the Idaho sales factor but not in the numerator of the Montana sales factor.

As a result of all the adjustments by the MTC auditor, which were adopted by the commission, the commission assessed against ASARCO Idaho income tax deficiencies of $92,471.88 for 1968, $111,292.44 for 1969, and $121,750.76 for 1970, plus interest. ASARCO sought review of the deficiencies in the district court pursuant to I.C. § 63-3049. Following a court trial, the district court upheld the combination of ASARCO with six of its subsidiaries for tax reporting purposes, but the court determined that the

commission had erred in including the dividends, interest, royalties, rents and capital gains as business income. The district court did not modify the numerator of the sales factor to include the intracompany ore transfers as requested by the commission. The commission has appealed from the district court's ruling concerning the classification of income and from the court's refusal to modify the sales factor. ASARCO has not cross appealed from the district court ruling that the six subsidiaries were properly combined with ASARCO. This appeal therefore raises two sets of issues: (1) the classification of the disputed income, and (2) the modification in the sales factor. We address them in that order.

II

CLASSIFICATION OF INCOME

ASARCO challenged the commission's apportionment of its income from dividends, interest, rentals, capital gains and royalties as being inconsistent with a proper interpretation of the definition of business income found in I.C. § 63-3027(a)(1) and as being in violation of the due process and commerce clauses of the United States Constitution. We consider first the issue of statutory construction and second the constitutional issues.

A

Interpretation of Statutory Provisions

Business income is defined as:

> "63-3027. COMPUTING TAXABLE INCOME OF CORPORATIONS.— . . . .
>
> "(a) As used in this section, unless the context otherwise requires:
>
> "(1) 'Business income' means income arising from transactions and activity in the regular course of the

taxpayers' trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute integral *or necessary* parts of the taxpayers' trade or business operations. *Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation shall be presumed to be income from intangible property, the acquisition, management or disposition of which constitute an integral part of the taxpayers' trade or business; such presumption may only be overcome by clear and convincing evidence to the contrary. . . .*" (Emphasis indicates provisions not part of the uniform act but added by the Idaho legislature.)[2]

A few general comments concerning this definition of business income are necessary in order to put the issues raised in this appeal in the proper perspective.

First, the income referred to in subsection (a)(1) is income arising from the taxpayer's trade or business which is conducted, in part at least, in this state. Some corporations, particularly large conglomerates, may be engaged in several separate and distinct trades or businesses. The state may include as business income only the taxpayer's income arising from a trade or business conducted in this state and is not entitled to apportion income arising from a trade or business having no connection with this state.

[2] In 1969 the legislature amended I.C. § 63-3027(a)(1) by deleting a phrase which limited the application of the presumption stated in the second sentence of the subsection to corporations "in which the taxpayer owns or has a right to acquire, directly or indirectly, more than five per cent (5%) of the voting stock . . . ." Ch. 319, § 9, 1969 Idaho Sess. Laws 982, 991-92. Neither party has argued that the prior statute requires a different result in this case than the application of the current statute, and the effect of that amendatory legislation is not an issue in this case.

However, "whether a number of business operations having common ownership constitute a single or unitary business or several separate businesses for tax purposes depends upon whether they are of mutual benefit to one another and on whether each operation is dependent on or contributory to others." Great Lakes Pipe Line Co. v. Commissioner of Taxation, 138 N.W.2d 612, 616 (Minn. 1965), *appeal dismissed* 384 U.S. 718 (1966). *See* Sperry & Hutchinson Co. v. Department of Revenue, 527 P.2d 729 (Ore. 1974); Idaho State Tax Comm. Reg. 27.IV.1.(b).[3] This qualification, though not directly stated by the statute's literal language, is required by the theory underlying apportionment statutes, *i.e.*, that the business income of a unitary business operating in several states cannot be precisely identified with particular states, *see generally*, Butler Bros. v. McColgan, 315 U.S. 501, 62 S.Ct. 701 (1942); Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L.J. 42 (1960), and by the constitutional requirement that there must be some minimal connection between the interstate business activities generating the income and the state seeking to tax that income. *See* Moorman Mfg. Co. v. Bair, —— U.S. ——, 98 S.Ct. 2340 (1978); Champion International Corp. v. Bureau of Revenue, 540 P.2d 1300, 1307-08 (N.M.Ct.App. 1975) (Lopez, J., specially concurring).

Second, under I.C. § 63-3027(a)(1) business income includes not only a corporation's typical earnings from its business activities but also income from tangible and intangible property if that property and income has the requisite connection with the corporation's trade or business. Prior to UDITPA most states did not apportion a multistate corporation's income from dividends, interest,

[3] Subsequent to the years involved in this appeal, the Idaho State Tax Commission adopted the interpretive regulations promulgated in 1973 by the Multistate Tax Commission. The Idaho regulation cited corresponds to MTC regulation IV.1.(b).

royalties, rents and gains, but, with some exceptions, the states allocated that income to a single jurisdiction. *See* State Taxation of Interstate Commerce: Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance, 93rd Cong. 1st Sess. 246, 252-54 (1973) (prepared statement of James H. Peters, The Distinction Between Business Income and Non-Business Income). Indeed, a preliminary draft of the uniform act followed this general approach. *See* First Tent. Draft of Uniform Allocation and Apportionment of Income Act, §§ 4-9, *reprinted in* Brief for Amicus Curiae, United States Steel Corp., Exhibit A. However, the Act in its final form and as enacted in this state specifically includes income from "the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute integral or necessary parts of the taxpayer's trade or business operations" as business income. I.C. § 63-3027(a)(1). This break with prior practice is underscored by the Idaho version of the Act which contains the specific presumption that income "from stock and securities of any foreign or domestic corporation" is business income and which may be overcome only by "clear and convincing evidence." I.C. § 63-3027(a)(1). In short, classifying income as interest, rents, royalties, dividends and capital gains does not determine whether the income is apportionable under UDITPA. All forms of income are subject to apportionment under UDITPA if the income falls within the definition of business income.

Third, we do not understand the statutory requirement that the acquisition, management, or disposition of the underlying property be an "integral or necessary" part of the taxpayer's trade or business, I.C. § 63-3027(a)(1), to mean that the property must be an absolutely indispensable part of the taxpayer's business. In taxation statutes the word "necessary" is not generally given such a restrictive meaning. *See, e.g.*, Welch v. Helvering, 290 U.S.

111, 54 S.Ct. 8 (1933) (expense deduction); Palo Alto Town & Country Village, Inc. v. Commissioner, 565 F.2d 1388 (9th Cir. 1977) (expense deduction); Boy's Club of Clifton, Inc. v. Township of Jefferson, 371 A.2d 22 (N.J. 1977) (exemption from property tax). Also, the word "necessary" was added to the uniform act by the Idaho legislature at the same time it added the presumption that income from stock and securities is business income. *See* ch. 254, § 1, 1965 Idaho Sess. Laws 639, 642-47. A very restrictive interpretation of "integral or necessary" would be inconsistent with the apparent legislative belief that income from securities would generally be business income. In our view the phrase "integral or necessary parts of the taxpayers' trade or business operations" refers to property which, though not absolutely essential to the conduct of the taxpayer's business, contributes to and is identifiable with the taxpayer's trade or business operations. *Cf.* Superior Oil Co. v. Franchise Tax Board, 386 P.2d 33, 38 (Cal. 1963) (defining "essential" as used in test for unitary business).

Although we do not read the phrase "integral or necessary" restrictively, our interpretation of that phrase is not as broad as that argued by the commission in this case. In a sense all investments and investment income of a corporation may benefit a corporation's business operations in that the investments may supply additional revenue for operating the trade or business, may improve the corporation's standing and financial posture, and in general may permit the corporation to conduct its regular business activities in a way it could not absent those investments. In this broad sense all corporate investments could be thought of as property the acquisition, management or disposition of which constitutes an integral or necessary part of its trade or business operations. This is the position argued by the commission. However, such an approach would include virtually all income as business income and would in effect emasculate the provisions of UDITPA which provide

for the allocation of income from specified tangible and intangible property. *See* I.C. § 63-3027(d)-(h). Under such a test it is doubtful whether a corporation could receive income that would not be classified as business income. Although the legislature clearly intended that the income from tangible and intangible property be included as business income in proper circumstances, it likewise intended that there would continue to be such a thing as corporate non-business investment income. Just as we reject the notion that income from tangible or intangible property is to be automatically classified as non-business income, we reject the notion that such income is to be automatically considered business income simply because the taxpayer's business operations may receive some incidental benefits from those investments.[4] *But see* Montana Department of Revenue v. American Smelting & Refining Co., 567 P.2d 901, 907-08 (Mont. 1977), *appeal dismissed* —— U.S. —— (1978).

In our view, in order for such income to be properly classified as business income there must be a more direct relationship between the underlying asset and the taxpayer's trade or business. The incidental benefits from investments in general, such as enhanced credit standing and additional revenue, are not, in and of themselves, sufficient to bring the investment within the class of property the

[4] The extent to which income from intangibles is to be apportioned as business income has been a source of controversy within the MTC itself. In 1971 the MTC promulgated interpretive regulations containing a very expansive definition of business income in this respect. *See* 32 CCH State Tax Rev. No. 40 at 3-4 (Oct. 5, 1971). However, in 1973 the MTC promulgated a new set of regulations which retreated somewhat from the expansive interpretation contained in the 1971 version. *See* 34 CCH State Tax Rev. No. 10 at 2-6 (Mar. 6, 1973); *see discussion* Boren, Specific Allocation of Corporate Income in California: Some Problems in the Uniform Division of Income for Tax Purposes, 30 Tax L.Rev. 607, 681-700 (1975).

acquisition, management or disposition of which constitutes an integral part of the taxpayer's business operations. This view furthers the statutory policy of distinguishing that income which is truly derived from passive investments from income incidental to and connected with the taxpayer's business operations.

Finally, the facts in this case are based substantially on a lengthy stipulation between the parties, and for the most part they are not disputed. The decisive issues concern the proper application of the Idaho version of UDITPA to these facts. Accordingly, the scope of our review, which is a review of questions of law, is substantially broader than in cases where we are reviewing issues which turn on the resolution of disputed facts. Montana Department of Revenue v. American Smelting & Refining Co., *supra*. *See* Wessells v. State, 562 P.2d 1042 (Alaska 1977); Walt Keeler Co. v. Atchison, Topeka & Santa Fe Ry. Co., 354 P.2d 368 (Kans. 1960); Wendling v. Cundall, 568 P.2d 888 (Wyo. 1977); *cf.* Clements v. Clements, 91 Idaho 732, 430 P.2d 98 (1967) (absence of findings disregarded where facts clear from record). Also, most of the disputed items of income are "[g]ains or losses and dividend and interest income from stock and securities of . . . foreign or domestic corporation[s]." I.C. § 63-3027(a)(1). Such items of income are presumed to be "from intangible property, the acquisition, management, or disposition of which constitutes an integral part of the taxpayer's trade or business;" and this presumption may be overcome only by "clear and convincing evidence to the contrary." *Id.* Thus we must review the evidence to determine whether the trial court's findings contrary to that presumption are supported by clear and convincing evidence. *See* Ed Sparks & Sons v. Joe Campbell Constr. Co., 99 Idaho 139, 578 P.2d 681 (1978).

With these principles in mind we turn now to the issues concerning the application of the business income defini-

tion to the items of income involved in this appeal. We discuss these issues in terms of the type of income involved.

Dividends: With respect to the dividends involved here, the critical question is whether this income arose from ASARCO's business activities and whether ASARCO's acquisition, management or disposition of the underlying stock constitutes an integral or necessary part of its mining, smelting and refining business.

The district court ruled that the commission erred in classifying the dividends as business income, stating:

> "The next question is whether the dividends, interest, patent royalties and capital gains, together with rental income, were subject to tax by the State of Idaho as business income. The court has reviewed the facts and the authorities submitted by the parties and has concluded that they are not. American Smelting and Refining Company is in the business substantially of mining, smelting and refining and sales. The income described does not come from property or activities which is an integral part of taxpayer's trade or business. Plaintiff's position is well taken in that it would be unreasonable, unfair and contrary to the law to allow the State of Idaho to throw this income in to be taxed under the circumstances of this case without allowing the plaintiff to consider all of the income and all of the expenses of all of the corporations involved. It appears to the court that if the dividend income from other corporations is an integral part of the business of the plaintiff that they should be unitized and all matters considered and if they are not that the income is not business income but is non business income."

The district court appears to have disapproved of the commission's action in including the dividends as business income for two reasons. First, the district court stated that

it was an error to include this income "without allowing [ASARCO] to consider all the income and all the expenses of all the corporations involved." Presumably the trial court was referring to the fact that the sales, payroll and property of the dividend-paying corporations were not represented in the three factor apportionment formula. We note, however, that although the statute clearly provides for the apportionment of dividend income when such income falls within the statutory definition of business income, it does not specifically provide for the representation of the sales, payroll and property of the dividend-paying corporations in the apportionment formula. *See* I.C. § 63-3027(j)-(r). The commission's apportionment of the dividends without including the factors of these corporations in the formula did not violate the statutory provisions. However, the commission's action does raise certain constitutional questions which we consider later in this opinion.

Second, the district court seems to have concluded that since the corporations which paid the dividends were not sufficiently connected with ASARCO's business operations to justify combining those corporations with ASARCO for tax reporting purposes pursuant to I.C. § 63-3027(s), the stock ASARCO owned in those corporations was *ipso facto* not an integral or necessary part of ASARCO's trade or business so as to justify including the dividends they paid ASARCO as part of ASARCO's apportionable business income under I.C. § 63-3027(a)(1). When corporations are combined under subsection (s) for tax reporting purposes, the dividends paid one corporation by the other are not considered income but, as the commission did in this case, are properly treated as intracompany transfers. The district court's reasoning, therefore, would preclude dividends from ever being classified as business income and is thus clearly inconsistent with subsection (a)(1) which presumes that dividends are business income. The effect of this reasoning would nullify the statutory provision, a result

we must avoid if possible. Magnuson v. Idaho State Tax Commission, 97 Idaho 917, 556 P.2d 1197 (1976).

However, these provisions are not necessarily inconsistent. They have different objectives and they can be read harmoniously if those objectives are kept in mind. The combined reporting provision of subsection (s) is a further refinement of the basic apportionment principle. Its purpose is to permit application of the UDITPA formula to a single business enterprise which is conducted by means of separately incorporated entities. *See* United States Steel Corp. v. Multistate Tax Commission, —— U.S. ——, ——, n. 25, 98 S.Ct. 799, 813, n. 25 (1978). In an economic sense such a business is no different than a similar business composed of a single corporation with several separate divisions. *Compare* Butler Bros. v. McColgan, *supra, with* Edison California Stores, Inc. v. McColgan, 183 P.2d 16 (Cal. 1947). For tax reporting purposes such businesses should be treated the same. Coca Cola Co. v. Department of Revenue, 533 P.2d 788 (Ore. 1975); Keesling, A Current Look at the Combined Report and Uniform Allocation Practices, 42 J.Tax. 106 (1975).

In contrast, subsection (a)(1), which authorizes the apportionment of a taxpayer's dividend income in certain circumstances, addresses a very different question. While the combined reporting provision concerns a proper identification of the contours of the business enterprise, the business income definition of subsection (a)(1) concerns the differentiation between truly passive investment income and income which is incidental to or connected with the taxpayer's business operations. These are two related but conceptually and legally very different questions. Simply because the management, operation and activity of a corporation in which the taxpayer owns stock is not so closely connected with the management, operation and activities of the taxpayer to warrant a combined tax return, does not *ipso facto* mean that the dividends the taxpayer receives from that stock cannot be "income arising from transactions and activities in the regular course of the taxpayer's trade or business" and that the "acquisition, management, or disposition" of the stock does not "constitute integral or necessary parts of the taxpayer's trade or business operations." I.C. § 63-3027(a)(1). The combined reporting provision and the business income definition serve different purposes, ask different questions and apply different standards. The answer to one does not necessarily imply the same answer to the other.

With respect to the dividends ASARCO received from Southern Peru Copper Corp.; M.I.M. Holdings, Ltd.; General Cable; Revere Copper; ASARCO Mexicana, S.A.; and Compania American Smelting, S.A., we conclude that the record does not contain clear and convincing evidence to rebut the statutory presumption and does not support the trial court's finding that those dividends were not business income. For the years in question ASARCO owned a controlling or at least a very substantial interest in each of these corporations. They are all engaged in businesses closely related to ASARCO's mining and smelting operations and, with the exception of M.I.M., ASARCO did a substantial amount of business with them and provided them with a variety of technical services. The clear inference from these facts is that ASARCO's interest in these companies was not merely that of a passive investor but that this dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral and necessary part of its mining and smelting business. We recognize that M.I.M., for the years in question, seems to have operated independently of ASARCO and did little if any business with ASARCO. Although ASARCO owns a controlling interest in M.I.M., ASARCO did not exercise its right to control the corporation, apparently for political reasons. Nevertheless, ASARCO does own a majority of M.I.M. stock and M.I.M. is engaged in

virtually the same business as ASARCO. Given these facts and the statutory presumption we conclude that the trial court erred in concluding that ASARCO's interest in M.I.M. was merely a passive investment unrelated to ASARCO's mining and smelting business.

However, we conclude that there was clear and convincing evidence to sustain the trial court's finding that the dividends from Lake Asbestos, ASARCO Int., Hecla Mining Co., Kennecott Copper Co., Phelps-Dodge and United Park City Mines were not business income. Although the record indicates certain management connections between ASARCO and Lake Asbestos and ASARCO Intl., the record indicates that this asbestos mining and processing activity is distinct, separate and unrelated to ASARCO's general mining and smelting business. Regardless of whether the dividends these corporations paid ASARCO would have constituted business income with respect to an asbestos business, the record discloses that these asbestos operations have no connection with the trade or business ASARCO conducts. Therefore, that dividend income is not business income subject to apportionment by this state. *See* Sperry & Hutchinson Co. v. Department of Revenue, *supra.*

The four remaining companies from which ASARCO received dividends are all engaged in mining activities similar to those pursued by ASARCO. Nevertheless, ASARCO's stock ownership in those companies is so small and its business dealings with them are so insignificant that, despite the statutory presumption, we conclude that the trial court's finding that ASARCO's ownership of that stock was more of a separate investment activity than a part of its trade or business operations is supported by the evidence. Therefore, the dividends these companies paid ASARCO should not have been included as business income.

Interest:[6] In general, the source of ASARCO's interest income was customer notes and other obligations ASARCO received in the regular course of its mining and smelting operations. As such, they were therefore properly considered as business income by the commission, and the trial court's findings to the contrary are not supported by the evidence. *See* Montana Department of Revenue v. American Smelting & Refining Co., *supra;* Sperry & Hutchinson Co. v. Department of Revenue, *supra;* Champion International Corp. v. Bureau of Revenue, *supra; cf.* Great Lakes Pipe Line Co. v. Commissioner of Taxation, 138 N.W.2d 612 (Minn. 1965) (interpreting statute analogous to UDITPA), *appeal dismissed* 384 U.S. 718 (1966).

Rents: ASARCO's rental income was primarily derived from property used in or very closely related to its mining and smelting operations. Accordingly, the trial court erred in excluding rents from business income. I.C. § 63-3027(a)(1) and (d). *See* Montana Department of Revenue v. American Smelting & Refining Co., *supra;* Champion International Corp. v. Bureau of Revenue, *supra.*

Royalties: The record indicates that the assets generating ASARCO's royalty income were acquired or developed by ASARCO in the course of its regular business operations. This income was related to or a consequence of its business operations and was therefore properly considered business income by the commission. *See* Montana Department of Revenue v. American Smelting & Refining Co., *supra; cf.* Texaco, Inc. v. Wasson, 237 S.E.2d 75 (S.C. 1977) (interpreting statute analogous to UDITPA).

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[6] The presumption of business income in I.C. § 63-3027(a)(1) extends only to "gains and losses and dividends and interest income from stock or securities of any foreign or domestic corporation. . . ." It does not apply to gains and losses and interest income from other sources or to rents and royalties. With respect to income not encompassed by the statutory presumption, ASARCO, as the plaintiff, bore the usual burden of persuading by a preponderance of the evidence.

Capital gains and losses: As previously mentioned, ASARCO's capital gains and losses resulted from the disposition of three types of assets: fixed assets, short term notes and bonds, and securities.

The fixed assets were used in ASARCO's everyday business activities and therefore gains realized on their disposition were business income. The trial court's finding to the contrary is not supported by the evidence.

The notes and bonds represented the short term investment of idle funds until they were needed in ASARCO's ordinary business operations. Accordingly, the trial court erred in not considering the gains realized from the disposition of those notes and bonds as business income. *See* Montana Department of Revenue v. American Smelting & Refining Co., *supra;* Sperry & Hutchinson Co. v. Department of Revenue, *supra;* Champion International Corp. v. Bureau of Revenue, *supra; cf.* Great Lakes Pipe Line Co. v. Commissioner of Taxation, *supra.*

ASARCO also realized gains from the sale of stock in its subsidiaries and General Cable. In our view the same standard applies to the question whether gains from the sale of stock are business income as applies to the question whether dividends from the stock are business income. The focus of the inquiry should be upon the purpose and use of the stock by ASARCO prior to its disposition. *See* I.C. § 63-3027(a)(1); Montana Department of Revenue v. American Smelting & Refining Co., *supra*; Champion International Corp. v. Bureau of Revenue, *supra; cf.* Johns-Manville Products Corp. v. Commissioner of Revenue Administration, 343 A.2d 221 (N.H. 1975) (similar approach, but not interpreting UDITPA), *appeal dismissed* 423 U.S. 1069 (1976). Inasmuch as we have already concluded that the trial court's conclusion that ASARCO sustained its burden of proving by clear and convincing evidence that the dividends it received from this stock were not business income is not supported by the evidence, we similarly conclude that the trial court's conclusion that the gains and losses realized on the disposition of the stock were not business income is not supported by the record.

Having resolved these issues concerning the items of ASARCO's income which are properly apportionable under the Idaho version of UDITPA, we consider now the constitutional questions.

B

Constitutional Issues

The constitutionality of formulary apportionment is firmly established under both the due process and commerce clauses of the United States Constitution. Moorman Mfg. Co. v. Bair, —— U.S. ——, 98 S.Ct. 2340 (1978); General Motors Corp. v. District of Columbia, 380 U.S. 553, 85 S.Ct. 1156 (1965); Bass, Ratcliff & Gratton, Ltd. v. State Tax Comm., 266 U.S. 271, 45 S.Ct. 82 (1924). ASARCO does not attack the constitutionality of formulary apportionment in the abstract, but argues that the manner in which the commission applied the UDITPA formula in this case produced a result violative of the due process and commerce clauses. We consider first the issues raised under the due process clause and then those raised under the commerce clause.

The Supreme Court of the United States recently summarized the limitations imposed by the due process clause on the states' power to tax the income of interstate businesses:

> "The Due Process Clause places two restrictions on a State's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing state. . . . Second, the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing

state.'" Moorman Mfg. Co. v. Bair, —— U.S. ——, ——, 98 S.Ct. 2340, 2344 (1978) (citations omitted).

In the context of the first due process restriction, ASARCO argues that the commission imposed a tax on income derived from sources and activities which have no connection with this state. In particular, ASARCO refers to the apportionment of dividends it received. ASARCO argues that these dividends are derived from the business activities of the dividend-paying corporations and that these corporations have no connection with Idaho. This argument, however, rests upon a misconception of what the state sought to tax. As the Vermont court recently ruled in In re Goodyear Tire & Rubber Co., 335 A.2d 310 (Vt. 1975):

> "Goodyear's constitutional argument rests on its allegations that its extra-territorial values are being taxed. This allegation, however, fails to distinguish the foreign dividend income that Goodyear receives from its subsidiaries from the profits those subsidiaires realize from their own business activities conducted without the borders of Vermont. The right to receive dividends is incident to the ownership of stock. La-Fountain & Woolson Co. v. Brown, 91 Vt. 340, 342, 101 A. 36 (1917). Profits, on the other hand, are the net proceeds obtained by deducting from the gross proceeds all forms of expense or outlay involved in, or incidental to, the business in question. Stratton v. Cartmell, 114 Vt. 191, 195, 42 A.2d 419 (1945).
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> . . . .
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> "The failure of the county court to make a finding on the issue of whether Goodyear's subsidiaries were operated as separate entities does not constitute error because of the lack of relevance such a finding has to the taxation of foreign dividend income. Vermont's corporate income tax does not seek to tax the profits

> realized from the business activities of Goodyear's subsidiaries conducted without the borders of Vermont. It is taxing only the dividend income realized by Goodyear itself." *Id.* at 311-12.

See F. W. Woolworth Co. v. Commissioner of Taxes, 328 A.2d 402 (Vt. 1974); Gulf Oil Corp. v. Morrison, 141 A.2d 671 (Vt. 1958). The commission did not levy a tax upon the income of the dividend-paying corporations; rather, it levied a tax upon ASARCO's income. Those dividends are clearly part of ASARCO's income and it is unquestioned that there is a sufficient connection between ASARCO and this state to constitutionally permit the state to tax its proper share of ASARCO's income. If the due process clause were to prohibit the inclusion of dividends in a taxpayer's taxable income unless the payor corporation also conducts business within the taxing state, the due process clause would logically also prohibit the taxpayer's domicile from taxing those dividends if the payor corporation did not conduct its business within the domiciliary state, and indeed it would prohibit the United States and any state from ever taxing dividends paid the taxpayer by a corporation whose activities are located entirely without this country. The due process clause simply does not limit the right to tax dividends paid a taxpayer to the jurisdictions in which the payor corporation conducts its business. We believe that any constitutional limitations upon a state's right to apportion the intangible income, including dividends, of a multistate corporation doing business within the state are satisfied by the Idaho statutory requirement that the acquisition, management or disposition of the underlying asset must be an integral or necessary part of the taxpayer's unitary business, a part of which is conducted in this state. *See* In re Goodyear Tire & Rubber Co., *supra;* F. W. Woolworth Co. v. Director of Division of Taxation, 213 A.2d 1 (N.J. 1965); Great Lakes Pipe Line Co. v. Commissioner of Taxation, 138 N.W.2d 612 (Minn. 1965), *appeal dis-*

missed 384 U.S. 718, (1966); Champion International Corp. v. Bureau of Revenue, 540 P.2d 1300 (N.M.App.Ct. 1975); *cf.* National Leather Co. v. Massachusetts, 277 U.S. 413, 48 S.Ct. 534 (1928) (franchise tax measured by capital stock); Cleveland-Cliffs Iron Co. v. Michigan Corporation & Securities Comm., 88 N.W.2d 564 (Mich. 1958) (franchise tax measured by capital stock). *But see* Square D Co. v. Kentucky Bd. of Tax Appeals, 415 S.W.2d 594 (Ky. 1967); Gulf Oil Corp. v. Clayton, 147 S.E.2d 522 (N.C. 1966).

In the context of the second due process limitation—that the income attributed to Idaho for tax purposes must be rationally related to values connected with this state—ASARCO attacks the commission's computation of its tax liability on two grounds. ASARCO first argues that if the dividends it received are included as apportionable business income, then the due process clause requires that the property, payroll and sales factors of the dividend paying corporations be included in the denominator of the apportionment formula; otherwise ASARCO claims the income apportioned to Idaho would be disproportionate to the income producing activities within the state. This argument is premised on the same misconception about the entity and income the state is attempting to tax that we discussed above and has been soundly rejected for the same reasons. F. W. Woolworth Co. v. Commissioner of Taxes, 328 A.2d 402 (Vt. 1974); *see also* F. W. Woolworth Co. v. Director of Division of Taxation, 213 A.2d 1 (N.J. 1965).

In any event, I.C. § 63-3027 does not provide for the inclusion of the factors of these corporations in the apportionment formula. From a constitutional standpoint, this argument presents the same question raised by ASARCO's second argument that, regardless of whether the apportionment formula was properly computed, in this case it produced a result violative of the due process clause. The United States Supreme Court recently summarized the burden ASARCO must sustain in order to prevail on this argument:

> ". . . But in neither *Hans Rees'* nor *Norfolk & Western* did the Court depart from the basic principles that the States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted . . . in that State.' 283 U.S., at 135, or has 'led to a grossly distorted result.' 390 U.S., at 326. Moorman Mfg. Co. v. Bair, —— U.S. ——, 98 S.Ct. 2340, 2345 (1978).

ASARCO's arguments in this respect are based upon a comparison of the income apportioned to Idaho by the formula with the income ASARCO claims was actually earned by its Idaho operations as evidenced by its own separate accounting analysis. For example, ASARCO's separate accounting analysis shows a loss of $1,464,885 from its Idaho operations in 1969. This loss was primarily from its exploration and development activities. Testimony indicated that some of its Idaho operations operated at a profit. However, the apportionment formula attributed $2,274,750, or 2.53% of ASARCO's business income in 1969, to Idaho.

In general, multistate businesses have been remarkably unsuccessful in attacking the results of apportionment formulas by comparing those results with those of a separate accounting analysis. *See, e.g.,* Butler Bros. v. McColgan, 315 U.S. 501, 62 S.Ct. 701 (1942); John Deere Plow Co. v. Franchise Tax Bd., 238 P.2d 569 (Cal.), *appeal dismissed* 343 U.S. 939 (1951); Walgreen Co. v. Commissioner of Taxation, 104 N.W.2d 714 (Minn. 1960); Crane Co. v. Carson, 234 S.W.2d 644 (Tenn.), *cert. denied* 340 U.S. 906 (1950). *But see* Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123, 51 S.Ct. 385 (1931) (formula which taxed 80% of income while only 17% had actual source in state). The reason why such arguments generally fail is explained

in the United States Supreme Court's decision in *Butler Bros.*:

> "It is true that appellant's separate accounting system for its San Francisco branch attributed no net income to California. But we need not impeach the integrity of that accounting system to say that it does not prove appellant's assertion that extraterritorial values are being taxed. Accounting practices for income statements may vary considerably according to the problem at hand. . . . A particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders. . . . That may be due to the fact, as stated by Mr. Justice Brandeis in Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 121, 41 S.Ct. 45, 47, 64 L.Ed. 165, that a State in attempting to place upon a business extending into several States 'its fair share of the burden of taxation' is 'faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders.' Furthermore, the particular system used may not reveal the facts basic to the State's determination. . . . In either aspect of the matter the results of the accounting system employed by appellant do not impeach the validity or propriety of the formula which California has applied here." 315 U.S. at 507-08, 62 S.Ct. at 704 (citations omitted).

Accordingly, the constitutional question is not whether the result reached by the apportionment formula is grossly disproportionate to the result reached by ASARCO's separate accounting analysis, but the proper question is whether ASARCO has established by clear and cogent evidence that the income attributed to the state by the apportionment formula is in fact "out of all appropriate proportion" to ASARCO's business activities in the state. In our view ASARCO has not sustained that burden.

The essence of ASARCO's argument under the commerce clause is that since Idaho's use of the UDITPA apportionment formula may result in the duplicative taxation of its income by other states, the statute places an unconstitutional burden on interstate businesses. In particular, ASARCO emphasizes that since many states allocate income from intangible and tangible property to a single jurisdiction, the apportionment by Idaho of the same income will result in multiple taxation. However, ASARCO has not established that it was in fact subject to multiple taxation and the possibility of such double taxation has been rejected as a ground for invalidating an apportionment statute. Moorman Mfg. Co. v. Bair, *supra*. Moreover, the courts have consistently held that the possibility of overlapping taxation does not present constitutional problems so long as the state's formula, considered on its own merits, is not repugnant to the Constitution. *See* Moorman Mfg. Co. v. Bair, *supra;* General Motors Corp. v. State, 509 P.2d 1260 (Colo. 1973); Hellerstein, Symposium Foreword, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand.L.Rev. 335, 347 (1976). As the Court in *Moorman* stated:

> "This method [formula apportionment], unlike separate accounting, does not purport to identify the precise geographical source of a corporation's profits; rather, it is employed as a rough approximation of a corporation's income that is reasonably related to the activities conducted within the taxing State. The single-factor formula used by Iowa, therefore, generally will not produce a figure that represents the actual profits earned within the State. But the same is true of the Illinois three-factor formula. Both will occasionally over-reflect or under-reflect income attributable to the taxing State. Yet despite this imprecision, the Court

has refused to impose strict constitutional restraints on a State's selection of a particular formula. ——U.S. at ——, 98 S.Ct. at 2344.

We find no constitutional infirmity under the commerce clause in the statute before us in this case. The problem raised by ASARCO is essentially the result of the lack of uniformity between the states. It would indeed be ironic for us to strike down this statute, which is patterned after a widely adopted uniform act drafted in an attempt to provide some uniformity in this area, on the grounds that it may be in conflict with the statutes of some other states which have not adopted the uniform act.

III

SALES FACTOR

In computing the sales factor for the tax years in question the commission included in the numerator, which represents the sales attributable to Idaho, intracompany transfers of ore from ASARCO's mines in Idaho to its smelter in Montana. The trial court excluded those transfers from the Idaho sales factor. ASARCO contends that the transfer should not be included in the numerator of the Idaho sales factor since the statute requires the sales to be reported on a destination basis and Idaho was not the final destination of these sales. I.C. § 63-3027(p)(1). The commission, however, argues that ASARCO's accounting method made it extremely difficult, if not impossible, to determine the sales on a final destination basis and that its adjustment of the sales factor was a proper exercise of its authority under I.C. § 63-3027(r) to make adjustments in the formula when "the allocation and apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this state . . . ."

Although the record is somewhat confusing in this respect, the controversy appears to center on ASARCO's "margin method" of accounting, which ascribes the receipts

from the sale of primary metals to the various steps within its mining, smelting and refining operations. According to the auditor's testimony at trial, if ASARCO, for example, received $6.00 on the final sales of a primary metal, its margin method of accounting would attribute, for example, $3.00 to its mining operation, $1.50 to its smelting operation, $1.00 to its refining operation, and the balance of $.50 to sales or sales commission.

The auditor appears to have encountered two problems in computing the sales factor with records maintained on this basis. First, I.C. § 63-3027(a)(5) and (o) require that the sales factor be computed on a gross receipts basis. The auditor testified that the total sales computed under this margin method of accounting would be the same as when computed on a gross receipts basis only if the ore was first extracted from ASARCO's mines. Where the ore was purchased from other mines, the auditor concluded that ASARCO's accounting method would reflect only the total value of the services ASARCO performed in smelting, refining and selling the ore, which in our example would be $3.00, and not the total gross receipts ASARCO would receive on the final sale of the product, $6.00 in our example.

Second, in general UDITPA requires that sales be reported in the numerator only if the goods were shipped to a purchaser in the taxing state. *See* I.C. §§ 63-3027(p)(1) and -3027(p)(2). Although this margin method of accounting would presumably indicate the value of the services performed by ASARCO's various operations in the various states, the auditor concluded that the records ASARCO maintained using this accounting method did not allow him to ascertain the final destination of ASARCO's sales of primary metals.

Because of these difficulties in using ASARCO's accounting method, the MTC auditor adjusted the numerator of the Idaho sales factor to include the value of ore shipped

from ASARCO's mines in Idaho to its smelter in Montana. However, these transfers of ore were clearly not true sales but merely intracompany transfers. Nevertheless, the auditor apparently believed this adjustment was necessary because of his inability to compute the sales factor according to the statutory method and in order to make the computation of the numerator consistent with ASARCO's margin method of accounting and its computation of the denominator.

The trial court did not address the propriety of this adjustment. However, we believe that the apportionment formula should be computed according to the procedures set forth in the statute unless use of these procedures in a particular case is impossible or entirely impractical or unless it is clearly established that the result produced by the statutory formula does "not fairly represent the extent of the taxpayer's business activity in this state . . . ." I.C. § 63-3027(r). We therefore remand this issue to the district court for further proceedings to determine whether the sales factor can be computed according to the statutory method. If on remand the court concludes that it cannot or that it produces a result which manifestly does not represent the extent of ASARCO's activity in the state, the court is to determine whether the adjustment made by the commission was a reasonable exercise of its authority under I.C. § 63-3027(r).

The case is reversed and remanded for further proceedings and for recomputation of ASARCO's income tax liability in accordance with this opinion.

Reversed and remanded.

SHEPARD, CJ., MCFADDEN, DONALDSON and BISTLINE, JJ., concur.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 53182

AMERICAN SMELTING AND REFINING COMPANY, *Plaintiff*,

vs

IDAHO STATE TAX COMMISSION, *Defendant*.

MEMORANDUM

Plaintiff filed suit alleging that the Idaho State Tax Commission had improperly determined income tax deficiencies and interest against the plaintiff for the years 1968, 1969, and 1970 in that deficiencies and interest charges had been assessed against the plaintiff by reason of income which plaintiff derived from dividends, interest, patent royalties and capital gains subject to tax by the State of New York, the commercial domicile of the plaintiff.

This matter came on for hearing and was submitted to the court upon the stipulation of the parties and the evidence that had been presented. The parties have presented their briefs. The primary questions appear to be first whether the tax commission properly combined the plaintiff with six of its wholly own subsidiaries which constitute a unitary business enterprise.

The court has reviewed this matter and could spend considerable time discussing the matter which I don't think would be beneficial to either of the parties or the Supreme Court where this matter is obviously headed. The court has concluded that the plaintiff and the six subsidaries do constitute a unitary business enterprise and were properly so treated for tax purposes.

The next question is whether the dividends, interest, patent royalties and capital gains, together with rental

income, were subject to tax by the State of Idaho as business income. The court has reviewed the facts and the authorities submitted by the parties and has concluded that they are not. American Smelting and Refining Company is in the business substantially of mining, smelting and refining and sales. The income described does not come from property or activities which is an integral part of taxpayer's trade or business. Plaintiff's position is well taken in that it would be unreasonable, unfair and contrary to the law to allow the State of Idaho to throw this income in to be taxed under the circumstances of this case without allowing the plaintiff to consider all of the income and all of the expenses of all of the corporations involved. It appears to the court that if the dividend income from other corporations is an integral part of the business of the plaintiff that they should be unitized and all matters considered and if they are not that the income is not business income but is non business income.

Counsel for the plaintiff may prepare such Findings of Fact and Conclusions of Law and Order as is necessary in conformance with this opinion.

Dated this 13th day of November, 1975.

/s/ MARION J. CALLISTER
Marion J. Callister
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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AMERICAN SMELTING AND REFINING COMPANY, *Plaintiff*,

vs

IDAHO STATE TAX COMMISSION, *Defendant*.

FINDINGS AND CONCLUSIONS

The court being fully advised in the premises, after having presided at pre-trial hearings, heard presentations of evidence at trial and argument and reviewed various briefs of the parties does hereby make the following:

Findings of Fact

1. The court has jurisdiction of the matters involved in this controversy and of the parties.

2. The court adopts and incorporates as if set out herein the stipulations of fact entered into, agreed upon, executed and entered into the record by the parties and the facts recited in the pre-trial order agreed upon by the parties and signed by the court.

3. Deficiency assessments against the plaintiff for the year 1968 in the amount of $92,471.88; 1969 in the amount of $111,292.44; and 1970 in the amount of $121,750.76 are the subject matter of this litigation.

4. The plaintiff utilizes separate accounting for internal purposes, uses this method for determining and reporting its taxable income for federal tax purposes and this method accurately reflects the plaintiff's taxable income in the State of Idaho.

5. The State Tax Commission is apportioning all income of taxpayer as business income and through apportionment taxing a portion of all plaintiff's income.

6. Plaintiff uses a separate accounting method using a margin's system. Plaintiff's taxable income in Idaho determined by separate accounting and plaintiff's taxable income in Idaho determined by apportionment method applied by the State Tax Commission in asserting the deficiency for the separate years involved in this case is:

	Separate Accounting	Apportionment	Difference
1968	($290,304.00)	$1,541,198.00	$1,831,502.00
1969	($1,464,885.00)	$2,274,750.00	$3,373,835.00
1970	($2,292,929.00)	$2,162,346.00	$4,455,275.00

7. The plaintiff is in the business of mining of copper and non-ferrous metals, gold, silver, copper, lead, zinc and asbestos, and in smelting and refining and selling these metals and in the sale of secondary metals. For the years involved, the percentage of operating income realized by plaintiff from its separate business operations is set out below

	1968	1969	1970
Mining	66%	59%	76%
Smelting & Refining	33%	38%	22%
Secondary Metals	1%	3%	2%

Mining earnings from separate minerals mined are:

	1968	1969	1970
Copper	86%	88%	91%
Lead and Zinc	12%	11%	7%
Silver	2%	1%	2%

8. Plaintiff's fixed asset investment in the separate businesses reflect the following percentages:

Mining	61%
Smelting and Refining	35%
Secondary Metals	4%

9. Plaintiff's principal business in Idaho is the mining of silver; it also mines lead and zinc, operates an administrative office for its northwest mining division and sells secondary metals in Idaho.

10. The silver mine operated by plaintiff in Idaho is the only silver mine owned or operated by plaintiff.

11. The plaintiff sells no primary metals, the destination of which is Idaho. Plaintiff sells secondary metals the destination of which is Idaho and for the years involved the sales were:

1968	$ 70,000.00
1969	$ 70,000.00
1970	$108,000.00

12. Plaintiff's mining operations in the northwest are limited to lead and zinc mines and the silver mine which it operates in Idaho.

13. Plaintiff's northwest mining division experienced losses for the years involved in the following amounts:

1968	($ 660,423.00)
1969	($2,880,727.00)
1970	($3,161,775.00)

14. Plaintiff does not smelt or refine ore produced in its Idaho mines in Idaho. This ore is shipped to smelters operated by the plaintiff in East Helena, Montana; El Paso,

Texas; and Selby, California. For the years involved, ore was shipped in the following proportions:

	East Helena	El Paso	Selby
1968	8.6%	40.7%	50.7%
1969	0%	56.5%	43.5%
1970	18.1%	58.3%	23.6%

15. For the years involved plaintiff's before tax earnings, including income from intangibles, and dividends paid by plaintiff to its shareholders were:

	1968	1969	1970
Before tax earnings	$80.6 mil.	$101 mil.	$102.5 mil.
Dividends paid	$38.2 mil.	55.2 mil.	53.9 mil.
Dividends as a percentage of earnings	48%	55%	53%

16. Plaintiff has never been required to utilize its stock as security for borrowing of working capital, acquiring stock or securities in other companies or to support any bond issues.

17. The taxpayer has sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from smelting, refining, sale of secondary metals or income from intangibles.

18. Plaintiff is the major custom smelter in the United States, doing approximately 80% of that work in this country.

19. Asarco Mercantile and International Metal Company are shell companies fully owned by the plaintiff, staffed, directed and controlled by plaintiff and using facilities owned by it and are subject to internal auditing by plaintiff. This subsidiary and the plaintiff constitute a unitary business.

20. Lone Star Lead Construction Company is wholly owned by plaintiff, staffed by plaintiff's employees, occupies facilities owned by plaintiff, identifies itself with its parent in advertising and does not operate independently of the plaintiff. This subsidiary and the plaintiff constitute a unitary business.

21. Enthone, Inc., is wholly owned by plaintiff, identifies itself with plaintiff in advertising, does not operate independently of the plaintiff and is subject to internal auditing by plaintiff. This subsidiary and the plaintiff constitute a unitary business.

22. Federated Metals is wholly owned and provided financing by plaintiff, does not operate independently of the plaintiff and is subject to internal auditing by plaintiff. This subsidiary and the plaintiff constitute a unitary business.

23. Northern Peru is wholly owned by plaintiff, does not operate independently of the plaintiff and is subject to internal auditing by plaintiff. This subsidiary and the plaintiff constitute a unitary business.

24. The combination of ownership and use through controlled operation is sufficient to require combination or unitization of these six companies with the plaintiff to accurately reflect income.

25. Asarco Australia, Asarco Development, Asarco Exploration, Compania American Smelting, S. A., Lake Asbestos of Quebec and Asarco International are wholly owned by plaintiff and are subject to control by plaintiff but are not integral or necessary parts of the plaintiff's business operations.

26. Neptune Gold Mining Company is 51.8% owned by plaintiff, is operated by plaintiff pursuant to contract but operates independently of plaintiff. Neptune Gold Mining Company is neither an integral part of plaintiff's business

nor necessary to plaintiff's business and prudent judgment does not dictate ownership of this stock.

27. Southern Peru Copper Sales is 51.5% owned by plaintiff, staffed by plaintiff's employees and is subject to control of plaintiff but is not an integral or necessary part of plaintiff's business operations which prudent business judgment dictates should be owned by plaintiff.

28. Asarco Mexicana is 49% owned by plaintiff, operates independently of plaintiff and is not an integral part of nor necessary to plaintiff's business and prudent business judgment does not dictate ownership of this stock.

29. Southern Peru Copper is 51.5% owned by plaintiff, subject to a management contract which insures that plaintiff will not be able to control said company, operates independently of plaintiff and is not an integral part of nor necessary to plaintiff's business nor does prudent business judgment dictate ownership of this stock.

30. M.I.M. Holdings is 52.7% owned by plaintiff, operates entirely independently of and has minimal contact with plaintiff, is not an integral or necessary part of plaintiff's business nor does prudent business judgment dictate ownership of this stock by plaintiff.

31. The court also finds that the other corporations in which plaintiff has stock interests are not controlled by plaintiff and are not integral parts of nor necessary to plaintiff's business and prudent business judgment does not dictate ownership of this stock by plaintiff.

32. Plaintiff has sustained its burden of proof and presented clear and convincing evidence that its income from intangibles is not business income.

33. The tax imposed pursuant to the method utilized by the State Tax Commission, apportioning dividends, interest, capital gains, rents and royalties as business income, and excluding from the property, sales and payroll factors

all or a proportionate part of the property, sales and payrolls of the corporations the dividends of which are apportioned arbitrarily assigns to Idaho income for tax purposes which does not reflect and greatly exceeds an amount which would accurately reflect plaintiff's business in Idaho.

Conclusions of Law

1. The court has jurisdiction of the subject matter and the parties.

2. Federated Metals of Canada, Asarco Mercantile, Inc., Enthone, Inc., International Metal Company, Lone Star Lead Construction Company and Northern Peru Mining Company are corporations wholly owned by plaintiff consolidation of which is necessary to accurately reflect plaintiff's income within the State of Idaho.

3. Asarco Australia, Asarco Development, Asarco Exploration, Compania American Smelting S.A., Lake Asbestos of Quebec, Asarco International, Southern Peru Copper, Southern Peru Copper Sales, M.I.M. Holdings, Neptune Gold Mining Company, Asarco Mexicana, General CAble, REvere Copper, Helca Mining, Kennicott Copper, Phelps Dodge, United Park City MInes [sic] and other companies in which plaintiff owns an interest are not integral to nor a necessary part of plaintiff's business operation nor does prudent business judgment dictate ownership of stock in these companies and plaintiff has met the burden of proof imposed upon it by statute in that the plaintiff has presented clear and convincing evidence that its income from intangibles is not business income.

4. The method used by the State Tax Commission in apportioning income is not authorized by the statute.

5. Plaintiff's income for 1968, 1969 and 1970 should be computed by apportioning business income but allocating

income from dividends, interest, royalties, rents and other non-business income to New York, its commercial domicile.

DATED this 14th day of November, 1975, as of this 15th day of January, 1976, nunc pro tunc.

/s/ MARION J. CALLISTER
Marion J. Callister
District Judge

The above findings and conclusions are accepted and ordered entered as a decision of the Ada County District Court.

/s/ ILLEGIBLE
District Judge

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

Docket No. C-340
C-501

In the Matter of the Petition for Redetermination of Income Tax Deficiency by

AMERICAN SMELTING & REFINING COMPANY (ASARCO)

DECISION

Taxpayer protests a Notice of Deficiency Determination proposing increases to its corporate income or franchise tax liability for calendar years 1968, 1969 and 1970. Initially, a Notice of Deficiency Determination was issued on September 14, 1971, for years 1968 and 1969. That determination was amended on March 27, 1973, when additional deficiencies were proposed for each of the initial two years, and a deficiency was also proposed for the calendar year 1970. (In addition, a deficiency for the calendar year 1967 was proposed, was not protested by the taxpayer, and is not in issue in this proceeding).

A protest dated April 12, 1973, was filed with the Commission April 18, 1973, objecting to the proposed deficiencies on the following grounds:

(a) The proposed deficiency incorrectly classified taxpayer and six of its subsidiary or affiliated corporations as a unitary enterprise pursuant to § 63-3027(s), *Idaho Code*. The six subsidiary or affiliated corporations are: (1) Federated Metals Canada Ltd. (2) ASARCO Mercantile Co. (3) Enthone, Inc. (4) International Metal Co. (5) Lone Star Lead Construction Corp. (6) Northern Peru Mining.

(b) The proposed deficiency incorrectly treated certain dividends (including dividends other than those received from the above six corporations), interest, patent royalties,

and capital gains as business income as such term is defined in § 63-3027, *Idaho Code.*

(c) Because the audit was in part conducted by the Multistate Tax Commission, and the Multistate Tax Compact is unconstitutional, the State Tax Commission may not, therefore, base an assessment upon the information obtained in the course of such audit.

In addition, the taxpayer, by a brief or "position" statement, attempted to add an additional objection to a portion of the proposed assessment imposing penalties on taxpayer. Such objection should have been raised by protest; however, it does not appear the staff has been prejudiced by the failure to include such objection in the protest and the protest or objection to the proposed assessment will be considered by the Commission.

The effect of the auditor's adjustment was to treat taxpayer and the six affiliated companies listed earlier in this Decision as a unitary business enterprise, combining such corporations into one entity or unit for accounting purposes, and to utilize the three factor formula provided by § 63-3027, *Idaho Code,* to determine what part of such unitary enterprise's income was properly attributable to Idaho. In addition, the auditor treated dividend income, interest, patent royalties, and capital gains received by members of the unitary enterprise as business income. Finally, the auditor imposed a penalty of 5 percent of the amount of the total deficiency based upon an erroneous reporting of part of a property factor during the year 1968.

The issue of the penalty imposed may be readily disposed of. During 1968 taxpayer had an inventory of ore. The inventory of ore was physically located within the state of Idaho and for Montana tax purposes was reported as being outside Montana, (and presumably within the state of Idaho). However, for Idaho tax purposes the inventory

was reported as not being within the state of Idaho, and such inventory was not included in data supposedly summarizing all Idaho property. There is no evidence indicating that a deliberate or willful misrepresentation to either state was intended; however, the error, while innocent, was not one that would be made by a reasonably prudent accountant in preparing the information needed. § 63-3046, *Idaho Code,* directs the assessment of a 5 percent penalty "if any part of any deficiency is due to negligence or disregard of rules and regulations" and Regulation 45 indicates that "any failure to file a tax return or to pay a tax lawfully due is presumed to be a result of negligence or disregard of the law, rules and regulations". In view of the statute, the penalty might seem to be "automatic"; however, practical experience the Commission has gained in administration of the tax laws of the state of Idaho indicates that each particular situation in which penalties have been assessed should be reviewed closely; we believe the proper objective is to both require full and honest disclosure from taxpayers by making it uneconomical to provide less than full and accurate disclosure, and at the same time not to unduly or unreasonably penalize taxpayers who have diligently attempted to comply with relevant statutes. In the present instance the Commission believes that the penalty should be imposed; however, the amount of the penalty should be restricted to the difference between the taxes due under taxpayer's initial reporting, and the taxes that should have been due if the information had been correctly reported. The effect of such a reduction is to make the penalty in this case commensurate with the magnitude of the error, and not to unduly penalize taxpayer because there were substantial other adjustments made at the same time as the adjustments warranting a penalty.

The remaining two issues are to some extent interrelated. In its protest, taxpayer objects to the treatment of ASARCO itself and the six corporations (hereafter referred to as the unitary subsidiaries) being combined for

accounting purposes. Such protest at some length objects to and points out why the taxpayer does not view such a unitary enterprise to be correct characterization. Later briefs, however, filed by the taxpayer do not treat this issue. In fact, if the Commission has correctly characterized dividends from the non-unitary enterprise corporations as business income, and if in fact the dividends from the unitary enterprise corporations would be business income to ASARCO itself, then the combination of the six unitary enterprise corporations with ASARCO to some extent decreases total tax liability to Idaho.

The doctrine of treating a series of inter-related corporations as a "unitary enterprise" is well established by judicial precedent. The doctrine originated in California, *Butler Bros. v. McColgan,* 315 U.S. 501, 62 S.Ct. 701, *Edison California Stores v. McColgan,* 183 P. 2nd 16 (Calif.) but today has been accepted in a number of jurisdictions. *Zale-Salem, Inc. v. State Tax Commission,* 237 Or. 261, 391 P. 2nd 601 (1964), *Interstate Finance Corp. v. Wisconsin Department of Taxation,* 28 Wis. 2nd 262, 137 N.W. 2nd 38 (1965). We believe § 63-3027(s), *Idaho Code,* was specifically intended to recognize the validity of the concept, which is grounded on the premise that corporations which do not in fact operate as independent business enterprises can only be effectively taxed as unitary business enterprises. In the present instance ASARCO itself characterizes its business in its protest (page 3) as ". . . the business of mining, smelting, refining, manufacturing, buying and selling non-ferrous metals, metalliferous and other mineral products."

While in years past there was some dispute over the point, for the years in question ASARCO itself has not contested the concept that it is engaged in only one business; it has not suggested that as a single company it engages in two or more businesses and it is quite clear from the evidence produced at the hearing that its business activ-

ities are so inter-related as to defy measurement by separate accounting, and to discredit the argument that its business in Idaho consisting of a silver-copper mine, and the exploration and development of ore bodies or mineral deposits, can be separated from ASARCO's worldwide activities.

The auditor suggested the following as indicating that the six unitary corporations are part of a unitary business enterprise consisting of themselves and ASARCO: (a) The wholly owned subsidiaries are engaged either in similar operations to ASARCO's or are conducting manufacturing or sales operations for ASARCO. (b) ASARCO and the unitary corporations have interlocking officers and directors which enables ASARCO to control the subsidiaries' activities and major management decisions. (c) Sales between ASARCO and the subsidiaries are numerous and services are provided between the subsidiaries and parent including management, accounting, budgeting, tax preparation, exploration, research, purchasing, sales and insurance procurement. (d) All of the subsidiaries are entirely owned by ASARCO. A brief description of the affiliated unitary corporations is helpful:

(a) *Federated Metals, Canada.* Effectively, this subsidiary may be characterized as ASARCO's method of doing business in Canada. In Canada it conducts the same business as the Federal Metals division of ASARCO carries on in the United States. The Federated Metals Division of ASARCO specializes in processing or re-processing used metals. It was originally created when ASARCO, during the 1930's, purchased the Federated Metals Company and converted it to a division of ASARCO. The division purchases scrap and also uses metals from its own primary plants when necessary; its main product is alloy metals or usable lead products such as lead rules and sheet lead. The Federated Metals Division of ASARCO does no business in Canada except to sell to Federated Metals, Canada;

Federated Metals, Canada, in turn does no business in the United States. ASARCO has provided capital to Federated Metals; the amount is not known, but interest on the loan from ASARCO to Federated Metals, Canada, varied between $140,000 to $200,000 per year.

(b) *ASARCO Mercantile.* ASARCO Mercantile business consists primarily of purchasing machinery and supplies for resale to other companies within the ASARCO group for resale. It was characterized by the witness for taxpayer as "a purchasing agent". It was set up to "isolate several of (the ASARCO subsidiaries) for Western Hemisphere trade corporation status". [See IRS (1954) Secs. 921 & 922] The prices at which such products would be bought and sold clearly can be effectively controlled by ASARCO management, and it seems to us that under any imaginable test, ASARCO Mercantile is properly categorized as "unitary" as it relates to ASARCO.

(c) *Enthone, Inc.* Enthone, Inc. produces metal finishing chemicals for sale to the metal finishing industry. It was acquired by ASARCO by purchase. Apparently its main business consists of sales of metal plating materials through relatively small commercial customers. Unlike other ASARCO affiliates, Enthone has its own sales force and has a more independent management (only the vice president of Enthone is also an officer of ASARCO). There are several members of the board of directors from ASARCO, however. Enthone purchases a part of its supplies and raw materials from ASARCO or other ASARCO affiliates; taxpayer's witness refused to characterize the purchases as "substantial" but did not know the nature of the purchases, which apparently are made from ASARCO's Federated Metals Division. Apparently, if needed supplies are available from ASARCO, they are purchased by Enthone from ASARCO.

(d) *International Metals Co.* International Metals Company business consists of purchasing metals from ASARCO

and resale of such metals overseas (generally in Europe). In fact, from the record made before the Tax Commission, if ASARCO Mercantile may fairly be characterized as a "purchasing agent" then International Metal Company may be fairly characterized as "a selling agent". Its sole function and existence seems to depend upon its activities in selling the ASARCO groups metal products overseas. Goods are sold by International Metal Co. from ASARCO's stock; its purchase from ASARCO and resale is a "paper" transaction and International Metal Co. serves as the conduit or selling agent for the ASARCO group's products. Finally, all of the officers of International Metal Co. are also officers or employees of ASARCO, and function interchangeably in their duties, one minute serving ASARCO, and the next International Metal Co.

(e) *Lone Star Lead Construction Corp.* Lone Star Lead is primarily in the business of installing or servicing lead lining in corrosive chemical tanks. Again, there apparently is common management and needed materials (including lead) are purchased from ASARCO.

(f) *Northern Peru Mining.* Northern Peru Mining conducts its primary business in Peru and it consists of operation of mines yielding lead, copper, zinc and silver. Northern Peru Mining is 100 percent owned by ASARCO; ore is treated in Peru in an initial treatment phase and reduced to a concentrate which contains approximately 25-30 percent copper. The ore during the period in question was then shipped to an ASARCO plant in California for further refining. The ore was processed at the California plant and sold through the ASARCO marketing system. During part of the time apparently all of the ore from the Northern Peru mine was sold to ASARCO; during the entire period most of the ore was sold to ASARCO. Sales to persons other than ASARCO occurred only because of a strike at the ASARCO California plant.

We believe the best statement of the definition or test for a unitary business enterprise was that formulated in *Butler Brothers vs. McColgan,* 111 P. 2d 334, and cited with approval in *Edison California Stores vs. McColgan,* 183 P. 2d 16:

> ". . . the unitary nature of appellant's business is definitely established by the presence of the following circumstances: (1) unity of ownership; (2) unity of operation as evidenced by central purchasing, advertising, accounting and management divisions; and (3) unity of use in its centralized executive force and general system of operation."

In the present instance we find each of the six corporations properly fall within the classification as an integral part of a unitary business enterprise, and they were properly combined by the auditor.

Finally, we must consider taxpayer's objection to the treatment of the following classes of income as business income:

1. Dividends
2. Interest
3. Patent Royalties
4. Gain from sales of capital assets

Very little was said during the hearing, or in briefs submitted by taxpayer or the staff, concerning items other than dividends. We believe that the management of investment and working capital is clearly an integral or regular part of this taxpayer's trade or business, and as the returns indicate, taxpayer received very substantial amounts of interest income (part of it coming from subsidiary corporations). While its direct interest income exceeded its direct income expense, we think on the record made before us that interest received by this taxpayer was received in

the regular course of its trade or business and arose from transactions and activities in the regular course of such trade or business.

The record is also unclear concerning the source and nature of taxpayer's patent royalty income.

We have already outlined the activities and business, and its relationship to that of ASARCO, carried on by the six unitary corporations combined with ASARCO. We would note that even if such companies were not combined with ASARCO, they are clearly inter-related with ASARCO, and dividends paid ASARCO by such companies would clearly be business income. We think it is helpful to outline the nature of the businesses conducted by the remaining corporations paying dividends to ASARCO.

(a) ASARCO Australia is a 100 percent owned subsidiary active in exploring minerals in Australia, and not operating within the United States.

(b) ASARCO Exploration Company is 100 percent owned and involved in mineral exploration activities, primarily outside the United States in Canada and other sections of the Western Hemisphere.

(c) ASARCO Developments is a 100 percent owned subsidiary involved in explorations in New Zealand.

(d) Compania American Smelting, S. A. is a 100 percent owned Chilian company whose activities are to buy ore in Chile. The purchases are made for ASARCO itself. Its character was described as that of a purchasing office for ASARCO; its profits are determined by the difference between the price it pays and the price at which it sells to ASARCO. That price in turn can be controlled by ASARCO, who owns the company and has the power to appoint officers and management.

(e) Lake Asbestos of Quebec, Ltd. is a 100 percent owned subsidiary involved in mining and sale of asbestos.

ASARCO International is a selling agent for Lake Asbestos and is a 100 percent owned subsidiary. Apparently its primary sales are in Europe; it is unclear whether they sell elsewhere.

(f) Southern Peru Copper is a 51.5 percent owned corporation. ASARCO has the power to appoint six of thirteen directors in Southern Peru Copper. Six of the remaining seven directors are appointed by other shareholders in the corporation and the thirteenth director apparently is chosen by the twelve appointed by ASARCO and other shareholders. ASARCO is the largest single shareholder; it indicates that the remaining three shareholders, owning the remainder of the stock, refuse to participate in the company unless assured that they would have a way to assure that management would not be completely dominated by ASARCO. Each company is entitled to purchase output from the mine in proportion to its stock ownership. ASARCO, for example, would be entitled to purchase 51.5 percent of available copper for sale. The product of the mine is "blister copper", which is copper that has been smelted and is approximately 97 percent pure. Blister copper, however, is not marketable, and must be refined before it can be commercially marketed. This refining, in the case of copper sold to ASARCO, is done in the United States at ASARCO refineries. ASARCO originally owned the mining property, and required approximately 235 million dollars to put it into production. ASARCO and the remaining three shareholders obtained loans from the Export-Import Bank and outside financing to develop the mine. ASARCO hopes that ownership or partial ownership of Southern Peru Copper Corporation will assure it of a long-term supply of copper, since physically there is a long-term supply of copper. The supply is dependent upon the political climate in Peru in that the mine could be ex-propriated by the Peruvian government.

(g) M.I.M., which apparently is a holding company for Mount Isa Mines, is a 52.7 percent controlled subsidiary. The company owns a large mine in Australia which produces gold, silver, lead, copper and zinc. The company owns smelters and a refinery in Australia and a substantial part of their product is sold in Japan and Europe. Sales to ASARCO are extremely limited; apparently they amount to no more than a few thousand dollars per year.

(h) Neptune Mining is a 51.8 percent owned subsidiary. During the years in question the company was involved in gold mining in Nicaragua; subsequent to those years the gold mining had been discontinued but lead and copper is being mined. The output of Neptune Gold mining is in the form of concentrates which are sold to ASARCO and refined and smelted at ASARCO's plants.

(i) ASARCO Mexicana, S. A. is a 49 percent owned subsidiary and apparently conducts the same business in Mexico that ASARCO carries on in the United States. In the words of the witness for ASARCO, the two businesses are "parallel". The remaining 51 percent of the stock in the company is owned by a group of Mexican citizens and the remaining ownership is scattered so that ASARCO is the largest single stockholder in the company. Products from ASARCO Mexicana, S. A. are sold to ASARCO.

(j) Mexicana de Cobra S. A. owns the mineral lands upon which ASARCO Mexicana operates.

In addition to the foregoing inter-relationships, ASARCO itself provides services to its subsidiaries. Subsidiaries are subjected to a charge from ASARCO for management, which is apportioned on the basis of direct costs. The witness from ASARCO was unable to indicate how these costs were determined or apportioned. ASARCO in past times apparently has provided substantial financing to the subsidiaries, or some of them. During the period, loans were made to Federated Metals. In general, ASARCO pays offi-

cers' salaries for all companies; the officers in fact are employees of ASARCO. Generally there is a common employee retirement plan; however, Northern Peru's is separate so also is that of Enthone and Federated Metals. ASARCO Mercantile had *no* employees of its own nor did International Metals.

ASARCO has a single required source for insurance; it has an arrangement to purchase insurance through a broker located at or near its headquarters building, and receives favorable rates because of its volume of purchase of insurance for itself and its subsidiaries. ASARCO maintains financial records for most of the subsidiaries except Northern Peru, Lake Asbestos and possibly Enthone. However, even these companies receive technical advice and some accounting services, and services in connection with preparing consolidated financial records and tax returns, from ASARCO itself.

ASARCO provides legal services for all of the subsidiaries.

Finally, and perhaps most important for an enterprise active in the mining and development of metals, ASARCO provides exploration and development services for the subsidiaries through its own exploration and development department, or through the subsidiary exploration and development companies.

Taxpayer strenuously argues that all dealings between the various companies were conducted "at arm's length" (which is an extremely tenuous argument since in many instances one officer was dealing for both of the "negotiating" parties as the agent of both companies) or at least such transactions were conducted at fair or reasonable prices. The argument mixes the very essence of formulary apportionment, which is that where there are integrated, interdependent steps in the economic process carried on by a business enterprise; there is no logical or viable method

for accurately separating the profit attributable to one step in the economic process from other steps. Essentially, formulary apportionment is necessary because inherent difficulties or impossibilities are present in seeking to divide the profits of a company like ASARCO where producing, manufacturing, and marketing are conducted by the same company but take place in different states. The argument for taxpayer is not strengthened by considering whether each of the separate manufacturing processes or steps could be conducted entirely separate from the remaining steps; if this took place, the Commission would not be attempting to measure a tax due from ASARCO and the unitary corporations with the strengths and weaknesses of an integrated operation that may commence in Peru and end in sale of products in Europe; the Commission would be faced with an entirely different taxpayer. We conclude that any attempt to separate out the profits of integrated steps of a business enterprise is unrealistic and futile. The problem is not merely one of measurement of what a component part might make if it were operated as a separate business; it is measurement of an integrated business enterprise.

The final major issue presented is whether income received by taxpayer in the form of dividends is properly apportioned as business income on the basis of the factors prescribed by § 63-3027, *Idaho Code,* or whether such income should be allocated to taxpayer's commercial domicile or some other state in its entirety.

The controversy seems to hinge on two questions:

1. Under § 63-3027, *Idaho Code,* is the income properly classified as "business income" or "nonbusiness income".

2. If the income in question is properly classified as "business income" does apportionment of such income offend the United States Constitution.

We find that the dividend income in question constitutes business income within the meaning of § 63-3027(a)(1), *Idaho Code.* "Business income" is defined as:

> ". . . income arising from transactions and activity in the regular course of taxpayers' regular business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitutes integral or ncessary parts of the taxpayers' business operations. Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation shall be presumed to be income from intangible property, the acquisition, management, or disposition of which constitute an integral part of the taxpayers' trade or business; such presumption may only be overcome by clear and convincing evidence to the contrary."

It seems clear that § 63-3027, *Idaho Code,* does not provide for automatic allocation to commercial domicile of all dividends, and provides only for allocation of dividends when they constitute "nonbusiness income".

> "Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, *to the extent that they constitute nonbusiness income,* shall be allocated . . ." § 63-3027(d), *Idaho Code.*

(For the year 1968, the last sentence of § 63-3027(a)(1) reads:

> "Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation in which the taxpayer owns or has the right to acquire, directly or indirectly, more than five per cent (5%) of the voting stock shall be presumed to be income from intangible property, the acquisition, management, or disposition of which constitute an integral part of the taxpayers' trade or business, such presumption may only be overcome by clear and convincing evidence to the contrary."

The change does not appear to be material in the present controversy since in all cases taxpayer owned 5 percent or more of the voting stock of the subsidiaries in question.)

Taxpayer has not shown by clear and convincing evidence that the acquisition, management, or disposition of the dividend paying subsidiaries in question does not constitute an integral part of its trade or business, and we find that the dividend income was business income.

The legislature has provided that as to income from dividends or capital gains on stocks, such income is presumed to be business income unless such presumption is overcome with clear and convincing evidence to the contrary. We do not believe by such provision the legislature intended to change the general principle that in situations such as the present the taxpayer must carry the burden of proof. It cannot be inferred that since the taxpayer must establish dividend income as nonbusiness income by clear and convincing evidence, that the Commission establish that other categories of income are business income. We think instead that the legislature only meant to provide a different standard of proof for the taxpayer in the case of dividend income and capital gains on stock.

Passing to the second question we see presented by this controversy, we do not believe that treating the income in question as business income offends the United States Constitution. If dividend income is to be taxed, there would seem to be two alternatives. The income can be treated as being earned at the "commercial domicile" of the corporation. The effect of such treatment is to arbitrarily assign to the state of commercial domicile one of the largest categories of income received by a large multistate taxpayer.

The concept of taxing all dividend income at the taxpayer's commercial domicile is a remnant of a fiction developed at an earlier date that the "situs" of an intangible was at a corporation's commercial domicile, which was very emphatically rejected by the Idaho Supreme Court in *John Hancock Mutual Life Insurance Co. vs. Neil,* 79 Idaho 385; and in *Futura Corporation vs. State Tax Commission,* 92 Idaho 288. The Supreme Court of the United States itself has not given support in its more recent decisions to the automatic assignment of intangible income to a taxpayer's commercial domicile, and we know of no case decided by the United States Supreme Court holding that income from intangibles must be assigned to the taxpayer's commercial domicile and cannot be assigned to other states. If a taxpayer has 10 percent of its assets, and its commercial domicile in state A, and 90 percent of its assets in state B, it is at least as reasonable to assume that 90 percent of its intangibles should be assigned to state B and 10 percent of its intangibles should be assigned to state A, as it is to automatically assume that all intangibles are held in state A. In fact, the key characteristic of an intangible is that is [sic] has no physical existence and has no physical location.

Whatever may be proper in the case of a taxpayer conducting a separate and distinct business operation involving investments and receipt of dividends, we think that where intangibles, or an investment in subsidiaries, is used as an integral and necessary part of the conduct of a taxpayer's trade or business the income is business income.

Finally, taxpayer contends that because the audit was in part conducted by the Multistate Tax Commission the proposed assessment is therefore invalid. Taxpayer does not further expound upon this principle in its brief and we are unable to follow the argument. We suppose the constitutionality is questioned because it is a compact between two or more states and because as might seem to be required by Article 1, Section 3 of the United States Constitution, consent by Congress has not been given. The argument has not been briefed by taxpayer or the staff, nor are we convinced that this Commission is the proper tribunal to determine the constitutionality of statutes duly enacted by the state legislature. However, we need not face that question; even assuming the compact be unconstitutional, it would by no means follow that the Commission could not utilize the fruits of an audit conducted by Multistate Tax Commission personnel.

WHEREFORE, the State Tax Commission hereby ORDERS that the Notice of Deficiency Determination dated September 14, 1971, and amended March 27, 1973, as herein modified, and which modification is shown on Exhibit "A" attached hereto, be hereby APPROVED, AFFIRMED and MADE FINAL.

DATED this 2nd day of July, 1974.

IDAHO STATE TAX COMMISSION

/s/ DON G. LOVELAND
Chairman

Orig: File
cerr: Taxpayer (R.R. #11,551)

(Certificate Omitted in Printing)

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12198

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff-Respondent,

v.

IDAHO STATE TAX COMMISSION,
Defendant-Appellant.

REMITTITUR

Justice Bakes announced the decision in this cause March 12, 1969, to the effect that the judgment of the District Court of the Fourth Judicial District of the State of Idaho, Ada County, is reversed and remanded for further proceedings as set forth in the opinion.

IT IS NOW THEREFORE SO ORDERED.

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the attached and foregoing is a true and correct copy of the opinion filed in the above entitled cause April 3, 1979, and now of record in my office.

WITNESS My hand and the seal of this Court April 3, 1979.

R. H. Young, Clerk

/s/ By: JUDY E. CIZMISH
Deputy Clerk

APPENDIX C

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CASE No. 53182

AMERICAN SMELTING & REFINING CO., *Appellant,*

vs.

IDAHO STATE TAX COMMISSION, *Appellee.*

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

The previous Notice of Appeal filed on May 23, 1979, is hereby amended to read:

NOTICE IS HEREBY given that American Smelting and Refining Company (ASARCO), the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Idaho entered on March 12, 1979, reversing the judgment of the District Court for the Fourth Judicial District in and for the County of Ada in case No. 53182 entered on November 14, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED this 29th day of May, 1979.

/s/ PHILIP E. PETERSON
Counsel for Appellant

LEE, TOOMEY & KENT
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Counsel for Appellant

(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12198

AMERICAN SMELTING & REFINING CO., *Appellant,*

vs.

IDAHO STATE TAX COMMISSION, *Appellee.*

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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DATED this 29th day of May, 1979.

/s/ PHILIP E. PETERSON
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APPENDIX D

Idaho Code § 63-3027

63-3027. COMPUTING TAXABLE INCOME OF NONRESIDENT PERSONS AND ANY CORPORATIONS.—The Idaho taxable income of a nonresident person with business situs in this state or any corporation with a business situs in this state shall be computed and taxed in accordance with the rules set forth in this section:

(a) As used in this section, unless the context otherwise requires:

(1) "Business income" means income arising from transactions and activity in the regular course of the taxpayers' trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute integral or necessary parts of the taxpayers' trade or business operations. Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation [in which the taxpayer owns or has the right to acquire, directly or indirectly, more than five per cent (5%) of the voting stock] shall be presumed to be income from intangible property, the acquisition, management, or disposition of which constitute an integral part of the taxpayers' trade or business; such presumption may only be overcome by clear and convincing evidence to the contrary.

(2) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(3) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(4) "Nonbusiness income" means all income other than business income.

(5) "Sales" means all gross receipts of the taxpayer not allocated under subsections (d) through (h) of this section.

(6) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(b) Any taxpayer having income from business activity which is taxable both within and without this state shall allocate and apportion such net income as provided in this section.

(c) For purposes of allocation and apportionment of income under this section, a taxpayer is taxable in another state if:

(1) In that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or

(2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(d) Rents and royalties from real or tangible personal property, capital gains interest, dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in subsection (e) through (h) of this section.

(e)(1) Net rents and royalties from real property located in this state are allocable to this state.

(2) Net rents and royalties from tangible personal property are allocable to this state:

(i) If and to the extent that the property is utilized in this state, or

(ii) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(f)(1) Capital gains and losses from sales of real property located in this state are allocable to this state.

(2) Capital gains and losses from sales of tangible personal property are allocable to this state if:

(i) the property had a situs in this state at the time of the sale, or

(ii) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(3) Capital gains and losses from sales of intangible personal property are allocable to this state if

the taxpayer's commercial domicile is in this state, unless such gains and losses constitute business income as defined in this section.

(g) Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state unless such interest or dividends constitute business income as defined in this section.

(h)(1) Patent and copyright royalties are allocable to this state:

(i) if and to the extent that the patent or copyright is utilized by the payer in this state, or

(ii) if and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(2) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patent product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(i) All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3).

(j) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(k) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight (8) times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(l) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period, but the [tax collector] *state tax commission* may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(m) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the tax period.

(n) Compensation is paid in this state if:

(1) the individual's service is performed entirely within the state; or

(2) the individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(3) some of the service is performed in the state and

(i) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or

(ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(o) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

(p) Sales of tangible personal property are in this state if:

(1) the property is delivered or shipped to a purchaser other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale, or

(2) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and

(i) the purchaser is the United States government or

(ii) the taxpayer is not taxable in the state of the purchaser.

(q) Sales, other than sales of tangible property, are in this state, if:

(1) the income-producing activity is performed in this state; or (2) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

(r) If the allocation and apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the [tax collector] *state tax commission* may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting, provided that only that portion of general expenses clearly identifiable with Idaho business operations shall be allowed as a deduction;

(2) the exclusion of any one or more of the factors;

(3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(s) For purposes of this section a parent and subsidiary corporation may, when necessary to accurately reflect income, be considered a single corporation.

(t) In computing the taxable income of a part-year or nonresident individual, trust or estate, the [optional standard deduction as defined in section 141 of] *stand-*

ard deductions as allowed by the Internal Revenue Code, if applicable, the exemptions as defined in section 151 of the Internal Revenue Code, and the Federal Income Tax deduction shall all be allowed in the proportion that the adjusted gross income of the taxpayer from Idaho sources bears to the total adjusted gross income from all sources before any deductions therefrom. The adjusted gross income, as used in this subsection, shall mean adjusted gross income as defined in section 62 of the Internal Revenue Code with adjustments for necessary additions and subtractions of income under this act.

SECTION 10. That Section 63-3031, Idaho Code, be, and the same is hereby amended to read as follows:

(Bracketed material deleted in 1969 pursuant to Section 9, Chapter 19, Session Laws of 1969.)

APPENDIX E

DIVIDENDS

	1968	1969	1970
UNITIZED			
Federated Metals of Canada	$ None	$ None	$ None
ASARCO	12,500	15,000	140,000
Mercantile Enthone, Inc.	340,000	400,000	940,000
Int'l. Inc.	50,000	200,000	
Lone Star Lead	80,000	80,000	160,000
No. Peru Mining Corp.	1,750,000	2,450,000	1,750,000
Compania American Smelting	15,687	26,385	
Lake Asbestos of Quebec, Ltd.	1,120,670	2,525,000	2,475,000
ASARCO Int'l. Corp.	70,000	80,000	135,000
So. Peru Copper Corp.	25,787,904	32,234,880	18,132,120
M.I.M. Holdings, Ltd.	9,661,070	20,466,130	33,647,396
ASARCO Mexicana, S.A.	1,882,918	1,882,918	1,882,918
General Cable	5,818,308	5,333,449	2,100,763
Revere Copper	2,814,444	2,814,444	2,345,370
Hecla Mining	91,729	46,242	11,561
Kennecott Copper Corp.	243,908	285,490	283,280
Phelps Dodge	269,850	300,690	323,820
Cia Minera de San Asidro y Aneyas, S.A.	50,557	—0—	—0—
Cia. Metalurgia Mex.	337,500	300,000	330,000
Japan Metal Finishing	8,454	6,081	11,383
Zinc Ind. S.A.	131,527	40,993	86,359
Pernix Enthone, S.A.		24,126	
Apache Power	5,600	7,600	8,000
TOTALS	$50,542,626*	$69,519,428*	$64,762,970*

* Total as shown in Federal Return for ASARCO

INTEREST

	1968	1969	1970
U.S. Government Securities	$1,182,989	$1,749,007	$2,239,199
United Park City Notes	12,000	12,000	12,000
Eisma Notes (sale of ASARCO Mexicana stock)	506,000	363,000	242,000
State and Local Bonds	330,489	672,635	111,023
Federated Metals of Canada, Ltd.		132,092	260,854
Revere Copper and Brass 5½% convertible debentures	1,251,965	1,251,965	1,251,965
N.Y. & Honduras Mining Co. Notes	24,559		
Bank Interest (fixed deposits)	63,306		
U.S. Reduction Corp. Notes		68,861	132,690
Sunshine Mining Company Notes		20,277	
Clayton Silver Mines Notes			25,375
Interest in connection with General Cable Sale			1,051,004
Neptune Gold Mining Note			4,673
Moran Notes (sale of Los Angeles plant)			56,250
Tax Refunds		17,579	329,296
Other Marketable Securities *	887,565	1,590,027	1,191,495
Other Interest Income	24,094	29,293	111,900
TOTALS	$4,282,917	$5,906,736	$7,019,724

See footnote on page 73

CAPITAL GAINS

	1968	1969	1970
Sale of M.I.M. Stock	$4,487,203	$2,230,370	$
Sale of Cia Minera de San Asidro y Aneyas stock	(645,817)		
Sale of Hecla Stock	3,753,251		141,098
Sale of U.S. Bonds (includes Federal Land Bank bonds)	118,906	81,406	
Sale of State & Local Bonds and notes	(1,723)	113,950	
Sale of Land, Buildings & Equipment**	16,232	98,089	51,952
Sale of U.S. Treasury Bonds			302,187
Sale of Connecticut 2¼% Bonds			16,844
Sale of General Cable Stock			45,482,303
Sale of Zinc Industrial, S.A.			406,207
TOTALS	$7,728,052*	$2,523,815*	$46,400,591*

* This is also reported on the ASARCO federal return.

** These represent Section 1245 recapture sales of property used in the business and are reported as ordinary income.

* *Other Marketable Securities:*			
Bankers Acceptances	$ 135,568	$ 360,833	$ 98,952
Time Certificates of Deposit	83,007	61,076	347,376
Commercial Paper Notes	668,990	1,168,118	746,402
	$ 887,565	$1,590,027	$1,192,760
Less amortization (time certificate deposits)			(1,265)
TOTAL ABOVE	$ 887,565	$1,590,027	$1,191,495

Supreme Court, U. S.
FILED
AUG 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1839

ASARCO INCORPORATED (formerly The American Smelting and Refining Company),

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee

ON APPEAL FROM THE
SUPREME COURT OF IDAHO

MOTION TO DISMISS OR AFFIRM

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INDEX

PAGE

MOTION 1

I. THE DUE PROCESS ISSUE 2

II. THE COMMERCE CLAUSE ISSUE 6

III. THE DECISION OF THE IDAHO SUPREME COURT IS NOT A FINAL JUDGMENT 10

CONCLUSION 13

I.

CITATIONS
TABLE OF CASES

PAGE

Adams Express Company v. Ohio State Auditor, 165 U.S. 194 (1897), Rehearing 166 U.S. 185 (1897) 5

Bass, Ratcliff and Gretton v. State Tax Commission, 266 U.S. 271 (1924) 3

Butler Brothers v. McColgan, 315 U.S. 501 (1942) 3, 4, 5

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 5, 7, 10

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 11

Flint v. Stone Tracy Co., 220 U.S. 107 (1911) 6

Ford Motor Company v. Beauchamp, 308 U.S. 331 (1939) 5, 6

General Motors Corporation v. District of Columbia, 380 U.S. 553 (1965) 5

General Motors Corporation v. Washington, 377 U.S. 436 (1974) 7

Hans Rees' Sons v. N. Carolina, 283 U.S. 123 (1931) 11, 13

Hump Hairpin Co. v. Emmerson, 258 U.S. 290 (1922) 12

International Harvester v. Evatt, 329 U.S. 416 (1947) 5, 12

Japan Lines Ltd. v. County of Los Angeles, 47 USLW 4477 (1979) 7, 10

Mobil Oil Corp. v. Commissioner of Taxes of Vermont, U.S. Sup. Crt. Dk. No. 78-1201, jurisdiction noted May 14, 1979 4

Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943) 8

Montana Department of Revenue v. American Smelting & Refining Company, 567 P.2d 901 (Mont., 1977), Appeal Dismissed 434 U.S. 1042 (1978) 3, 5, 8, 9

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 3, 5, 8, 9

Northwestern Portland Cement Company v. Minnesota, 358 U.S. 450 (1959) 5, 7

Radio State WOW v. Johnson, 326 U.S. 120 (1945) 11

Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975) 7

Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936) 5

Wisconsin v. J.C. Penney Company, 311 U.S. 435, (1940) 11

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Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee

ON APPEAL FROM THE
SUPREME COURT OF IDAHO

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Idaho Supreme Court on the grounds that the question presented is so unsubstantial as not to need further argument and, alternatively, that the decision of the Idaho Supreme Court is not a final judgment.

I
THE DUE PROCESS ISSUE

Throughout its Jurisdictional Statement Appellant (ASARCO) characterizes its business activities as twofold: (1) Its "operating business" [Jurisdictional Statement, page 7] of mining, smelting, refining and selling ferrous and nonferrous metals, and (2) Its "investment and holding company activities" [J.S., page 10]. The latter is characterized as a separate business having no requisite nexus or situs with the state of Idaho. Therefore, Appellant contends, no part of the income of this allegedly separate business can be apportioned to the state of Idaho. [J.S., page 10-11].

This characterization seriously misconstrues the Idaho Supreme Court's ruling. That Court determined that ASARCO had failed to prove that the dividends, interest and capital gains in question were earned from activities which were separate and distinct from its mining, smelting, refining and selling activities [J.S. App., pages 19, 21 and 22]. It is important to note that where the Idaho court found that ASARCO had established that the activities of dividend-paying subsidiaries were truly "separate and unrelated to ASARCO's general mining and smelting business" the dividends were to be classified as nonbusiness income, none of which could be attributed to Idaho [J.S. App., page 20]. Dividends which the Idaho Court found to result from "more of a separate investment activity than a part of its [ASARCO's] trade or business operations" could not be included in the business income, a part of which would be apportioned to Idaho. [J.S. App., page 20].

But in regard to that income about which ASARCO seeks review, the Idaho Court said:

> The clear inference from these facts is that ASARCO's interest in these companies was not merely that

> of a passive investor but that this dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral and necessary part of its mining and smelting business. [J.S. App. 19]

An accurate understanding of the Idaho Court's decision in this regard is important since the Appellant's Jurisdictional Statement concedes (on pages 10 and 11) that the decisions of this Court allow apportionment of the income of "truly unitary businesses." See *Butler Brothers v. McColgan*, 315 U.S. 501 (1942); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); and *Bass, Ratcliff and Gretton v. State Tax Commission*, 266 U.S. 271 (1924). In short, the Idaho Supreme Court has applied the constitutional criteria in precisely the manner the Appellant contends is proper. That is, income which is entirely separate from Appellant's mining, smelting, refining and selling activities may not be attributed to Idaho, even in part, but income earned from the activities which are a part of the unitary business conducted both within and without Idaho may properly be apportioned to Idaho. The only difference of opinion between the Appellant and the Idaho Supreme Court is the Idaho Court's finding that the evidence submitted by ASARCO failed to prove, by clear and convincing evidence, that these particular dividends, capital gains and interest in fact were unrelated to its unitary mining, smelting, refining and selling activities.

The Idaho statute's requirement that a taxpayer prove by clear and convincing evidence that its dividends, interest and gains and losses are not part of its unitary business [*Idaho Code* §63-3027 (a) (1) at J.S. App., page 63] is appropriate since this Court has held that a taxpayer who attacks an apportionment formula carries a distinct burden of showing by "clear and co-

gent evidence" that it results in extraterritorial values being taxed. *Butler Brothers v. McColgan,* supra.

The fact that the Idaho Court did not permit income proven by the taxpayer to be truly separate from its regular trade or business to be apportioned to Idaho clearly distinguishes this case from *Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* U.S. Sup. Crt. Dk. No. 78-1201, jurisdiction noted May 14, 1979. ASARCO's reliance on this Court's noting jurisdiction in *Mobil* is misplaced for two reasons. First, the Uniform Division of Income for Tax Purposes Act (UDITPA) as adopted in Idaho and construed by the Idaho Court clearly limits apportionment solely to the unitary income of a unitary business. Second, in applying the statutory language to the facts as presented by ASARCO, the Idaho court has carefully considered whether the income in question was directly related to the unitary business, a part of which is conducted in Idaho. These factors are entirely absent in the *Mobil* case from Vermont since the Vermont statute requires full apportionment of federal taxable income. The factual issues raised and resolved by the Idaho court were neither raised nor resolved in the Vermont case.

The factual record upon which the Idaho Court based its conclusion is clear. That Court's recital of the facts [J.S. App., pages 4-8] and its holding [J.S. App., pages 16-23] amply reflect the factual basis for concluding that the income challenged by ASARCO is in reality related to its business activities in Idaho. Nor is the Idaho Court alone in this conclusion. The Montana Supreme Court reached the same conclusion in regard to the same taxpayer for the same taxable period. See *Montana Department of Revenue v. American Smelting & Refining Company,* 567 P.2d 901 (Mont., 1977), Appeal Dismissed 434 U.S. 1042 (1978).

As can be seen, therefore, Idaho has apportioned, as a part of ASARCO's unitary business income, earnings accruing to ASARCO as a regular part of its ordinary business activities. It has done so pursuant to a widely adopted uniform statute. This action gives rise to no federal due process questions not resolved by previous decisions of this Court.

The relevant principles are well established. A state may apportion the unitary income of a unitary business by application of the generally recognized three factor formula reflected in the Uniform Act. *General Motors Corporation v. District of Columbia,* 380 U.S. 553 (1965); *Butler Brothers v. McColgan,* 315 U.S. 501 (1942). It is equally well established that an apportionment formula which arrives at a rough approximation of income attributable to a particular state is constitutional. *International Harvester v. Evatt,* 329 U.S. 416, (1947).*

A long and unbroken line of cases upholds the power of states to apportion the unitary income of a unitary business. *Adams Express Company v. Ohio State Auditor,* 165 U.S. 194 (1897), Rehearing 166 U.S. 185 (1897); *Butler Bros. v. McColgan,* 315 U.S. 501 (1942); *Wheeling Steel Corp. v. Fox,* 298 U.S. 193 (1936); *Ford Motor Company v. Beauchamp,* 308 U.S. 331 (1939); *Northwestern Portland Cement Company v. Minnesota,* 358 U.S. 450 (1959); *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977); *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978). This Court has specifically allowed inclusion of the value of intangibles in such an apportionment scheme. See *Adams Express II,* 166 U.S. 185

*For each of the years in question, Idaho seeks the tax of approximately 2.5% of ASARCO's apportionable income based upon the percentage of its total property, payroll and sales attributable to Idaho [Trial Court Stipulation — Clerk's Transcript, pages 40, 44 and 48; Rptr's Trans. 129]. ASARCO seeks to exclude from its apportionable business income the substantial *gross* income amounts shown in Appendix E [J.S. App., page 71]. These amounts represent approximately 70% of its federal net taxable income.

(1897). There is no decision of this Court which requires or even permits the attribution of income from intangibles such as dividends, interest and capital gains to be taxed entirely by the recipient's state of commercial domicile if the income is related to business activities conducted in several states. Instead, cases which recognize the integral role such income, and the subsidiaries generating it, plays in the overall business necessarily suggest a contrary result. See *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) and *Ford Motor Company v. Beauchamp*, 308 U.S. 331 (1939). This Court's most recent statement in *Japan Lines v. County of Los Angeles*, 47 USLW 4477 (1979), also tends to a contrary result:

> The correlary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full. "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of domicile . . . Otherwise, there would be multiple taxation of interstate operations." *Standard Oil Co. v. Peck*, 342 U.S., at 384-385; *Braniff* [*Airways, Inc. v. Nebraska State Bd. of Equalization*], 347 U.S., at 601. [Bracketed material not in original.]

The due process requirements for apportioning income, as set forth by this Court, are clear and consistent. The Idaho Supreme Court in its opinion below has applied those rules correctly to the factual circumstances which it found before it. Its factual finding, that the income to be apportioned as unitary income, is amply supported by the record. For these reasons, there is no substantial due process federal question presented by this case.

II
THE COMMERCE CLAUSE ISSUE

The test for determining whether a state tax meets the requirements of the Commerce Clause as it applies

to interstate business was established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and restated in *Japan Lines Ltd. v. County of Los Angeles*, 47 USLW 4477 (1979). If the state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State," no impermissible burden on interstate commerce will be found. *Complete Auto Transit, Inc. v. Brady*, supra. In *Japan Lines v. County of Los Angeles*, supra., this Court imposed two additional considerations in the limited case of property taxes directly imposed on "instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce . . ." The two additional considerations required by *Japan Lines* in such circumstances are (1) whether the state tax creates some prohibited risk of double taxation and (2) whether the state tax interferes with federal policy regarding international commerce. Appellant, in its Jurisdictional Statement, relies on *Japan Lines* for the proposition that the Commerce Clause has been violated in this case. This reliance is clearly misplaced.

First, Appellant makes the barefaced allegation in its Jurisdictional Statement (at page 13) that it has experienced double taxation because foreign taxes have been extracted. This is a new contention on the part of Appellant not made at any prior stage in the proceeding. Consequently, the record is entirely devoid of evidence supporting this statement. Regardless of whether it is the actuality or the substantial risk of taxation which is the proper test, it is clear from the decisions of this Court that the taxpayer must prove that the risk or the actuality exist. See *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *General Motors Corp. v. Washington*, 377 U.S. 436, 449 (1974); *Standard Pressed Steel Co. v. Department of Revenue of*

Washington, 419 U.S. 560, 563 (1975); *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978).

Furthermore, contrary to Appellant's allegation, including the Appellant's dividends in income subject to apportionment in this case in no way affects foreign commerce. Idaho does not purport nor seek to tax the income of the subsidiaries resulting from their business activities outside the state of Idaho in either interstate or foreign commerce. See Idaho Supreme Court's Decision at J.S. App., pages 24-25. A shareholder is, of course, a taxable entity entirely separate from the corperation issuing the shares. *Moline Properties, Inc. v. Commissioner,* 319 U.S. 436 (1943). The dividend, capital gain and interest income in question represents income earned by ASARCO in the course of its acquisition, management or disposition of certain intangible assets, namely shares of stock in domestically incorporated subsidiaries. For ownership of a domestically incorporated corporation to result in dividends, interest or capital gains payable to its domestic shareholder (whether or not the shareholder happens to be incorporated) is not a transaction occurring in international commerce. Accordingly, the additional requirements imposed by *Japan Lines* do not apply.

The treaties cited by ASARCO do not establish any federal policy which is relevant to this case. These treaties affect only how the United States will tax foreign taxpayers and/or how foreign taxpayers will be taxed in the United States. The treaties establish no policy regarding how domestic taxpayers are to be taxed by the United States or any State.

Finally, even if this Court should find that the inclusion of this income in the income tax base subject to apportionment somehow results in a state tax being directly imposed on international commerce, such a conclusion would neither increase nor decrease the al-

leged risk of multiple international taxation. In *Japan Lines* the finding of multiple taxation lead this Court to conclude that the shipping containers in question were immune from all state property taxation. The Appellant here does not contend that the dividend, interest and capital gains in question are immune from state taxation but only contends that the authority to include it in the tax base is limited to the state of commercial domicile. It is difficult to see how subjecting all of the income to taxation at the state of commercial domicile creates a lesser risk of multiple taxation (on an international level) than does apportioning the same income among several states in which the taxpayer conducts business. To the extent that there is any risk at all, the risk in both circumstances is identical. (We believe, of course, as stated before, that there is no foreign commerce involvement).

The possibility that this income, arising from the domestic transaction of receiving dividends, interest or capital gains from a domestic subsidiary, may be subject to some overlap of state taxation does not, by itself, render the Idaho tax invalid. This Court said in *Moorman Mfg. Co. v. Bair,* supra., at 272-273:

> . . . Yet even were we to assume that the Illinois activities made some contribution to the profitability of the Iowa sales, appellant's claim that the Constitution invalidates an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State is incorrect.
>
> The Due Process Clause places two restrictions on a State's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing state. [Citation omitted] This requirement was plainly satisfied here. Second, the income attributed to the State for

tax purposes must be rationally related to "values connected with the taxing state." [Citation omitted]

Since 1934, Iowa has used the formula method of computing taxable income. This method, unlike separate accounting, does not purport to identify the precise and geographical course of a corporation's profits; rather, it is employed as a rough approximation of a corporation's income that is reasonably related to the activity conducted within the taxing State. The single-factor formula used by Iowa, therefore, generally will not produce a figure that represents the actual profits earned within the State. But the same is true of the Illinois three-factor formula. Both will occasionally over-reflect or under-reflect income attributable to the taxing State. Yet despite this imprecision, the Court has refused to impose strict constitutional restraints on a state's selection of a particular formula.

In summary, it is clear that the Idaho tax meets the fourfold test of *Complete Auto Transit v. Brady,* supra. The additional requirements imposed by *Japan Lines,* supra., are, at their greatest extent, limited to transactions or instrumentalities occurring in foreign commerce which create a demonstrated risk of multiple taxation on an international basis. Those criteria simply do not apply to the circumstances presented by this case.

III
THE DECISION OF THE IDAHO SUPREME COURT IS NOT A FINAL JUDGMENT

The jurisdiction of this Court to review the decision of the Idaho Supreme Court is, of course, based upon 28 U.S.C., §1257 which limits the appellate jurisdiction of this Court to review of "final judgments." The Idaho Supreme Court's decision (J.S. App., pgs. 30-32) remanded the case to the trial court for a determination of

certain factual issues relating to the proper determination of the sales factor portion of the apportionment formula. The Appellant contends (J.S. page 3) that this issue is purely one of statutory interpretation and is entirely separate from the constitutional questions upon which the Appellant seeks review. The Appellant cites *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); and *Radio Station WOW v. Johnson,* 326 U.S. 120 (1945), which support the general proposition that under certain circumstances, established by those cases, the Court may indeed assume appellate jurisdiction even though further proceedings in the case on the state court level are contemplated. The difficulty with the Appellant's contention is that the issue remanded by the Idaho court to the trial court is not severable from the issues upon which the Appellant seeks review but is necessarily related. A determination of the proper application of the sales factor under the UDITPA three-factor formula is necessary before it can be finally known what absolute amount or portion of ASARCO's total income Idaho will deem to have been earned from Idaho sources. This Court has held that a state taxing scheme must be judged based upon the result which it reaches. For example, in *Hans Rees' Sons v. N. Carolina,* 283 U.S. 123 at 135 (1931), the court held a North Carolina tax unconstitutional because "... [T]he statutory method, as applied to appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income all out of appropriate proportion to the business transaction transacted by the appellant in that State."

Other decisions also support the proposition that a state tax must be measured based upon its known result. In *Wisconsin v. J.C. Penny Company,* 311 U.S. 435, 444 (1940), the Court stated:

> That test is . . . whether the taxing power exerted by the state bears fiscal relationship to protection, op-

portunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

See also *Hump Hairpin Co. v. Emmerson,* 258 U.S. 290, 296 (1922) and *International Harvester v. Evatt,* 329 U.S. 416 (1947).

So long as the state courts have yet to determine how the sales factor portion of the three-factor UDITPA formula is to be applied to this taxpayer, the full extent of this taxpayer's income which the state is subjecting to income taxes is not known.

It is important that the entire apportionment formula as used in UDITPA and enacted in Idaho be clearly understood. It is found in *Idaho Code* §63-3027. (J.S. App., page 63) The steps for determining the amount of an interstate taxpayer's income which is attributable to Idaho are as follows: First, the total net taxable income from all activity and sources both within and without the state of Idaho is determined. Second, the amount of nonbusiness (nonunitary) income is computed and subtracted from the amount determined in step one. This result is the net business (unitary) income subject to apportionment. Third, an apportionment factor is computed. This apportionment factor is the average of three factors — sales in the taxing state divided by sales everywhere plus real and tangible personal property in the taxing state divided by such property everywhere plus payroll in the taxing state divided by payroll everywhere. Fourth, the apportionment factor as computed in the third step is applied to the net apportionable business income computed in the second step to determine the amount of apportionable income to be attributed to the taxing state. Fifth, any nonbusiness income found to be allocable in its entirety to the taxing state is added to the result determined in the fourth step. This sum represents the income subject to the tax

in the taxing state and to which that taxing state's tax rate may be applied.

The record does not reflect the precise amount of ASARCO's taxable income attributed to Idaho which a resolution of the sales factor issue might affect. The record does reflect that virtually all of the sales attributed to Idaho are included in the disputed amount. It is reasonable to conclude, therefore, that approximately one-third of ASARCO's total income tax liability to the state of Idaho remains in question.

Therefore, it can be clearly seen that the issues decided by the Idaho Supreme Court and the issue remanded by it to the trial court for further decision are inextricably tied together since all of the issues relate to the determination of variables in the same apportionment formula. The constitutional test by which that formula is measured is whether or not it attributes an amount of income which is in "appropriate proportion to the business transacted by the appellant" in the state of Idaho. [*Hans Rees' Sons,* supra.] Interestingly, Appellant's Jurisdictional Statement (on page 11) appears to agree that it is the *result* of the apportionment process by which the constitutional validity of that process must be measured.

CONCLUSION

For the reasons stated herein, this appeal should either be dismissed or affirmed.

DATED THIS 31st day of July, 1979.

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1839

ASARCO INCORPORATED (formerly The American Smelting and Refining Company),

Appellant,

v.

IDAHO STATE TAX COMMISSION

Appellee

ON APPEAL FROM THE
SUPREME COURT OF IDAHO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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INDEX

PAGE

CITATIONS iii

PARTICIPATING AMICUS CURIAE vii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE 1

I. INTRODUCTORY STATEMENT 4

II. STATEMENT OF INTEREST 4

III. COUNTER-STATEMENT OF QUESTION PRESENTED 10

IV. STATEMENT OF THE CASE 12

V. THE ARGUMENT 15

VI. CONCLUSION 26

CITATIONS

TABLE OF CASES

PAGE

Adams Express Company v. Ohio State Auditor, 165 U.S. 194 (1897), Rehearing 166 U.S. 185 (1897) 15, 18, 21, 22, 23

Albany International v. Halperin, 388 A.2d 209 (1978) 17, 25

Associated Dry Goods Corp. v. Commissioner of Taxation, 235 N.W.2d 821 (1975), affirming per curiam Minnesota Tax Court Decision in two State Tax Reports (CCH; Minnesota) § 200-678 (May 17, 1974) 17

Bass, Ratcliff and Gretton v. State Tax Commission, 266 U.S. 271 (1924) 15, 21, 24

Butler Brothers v. McColgan, 315 U.S. 501 (1942) 15, 16, 22

Champion International Corp. v. Bureau of Revenue, 88 N.M. 411, 540 P.2d 1300 (1975) 17

Cleveland Cliffs Iron Co. v. Corporation Securities Comm., 351 Mich. 652, 88 N.W.2d 564 (1958) 17

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 16

Comptroller of the Treasury, Income Tax Division v. Diebold, Inc., Court of Appeals of Maryland No. 112, Sept. Term 1976, Opinion filed Feb. 9, 1977 17

Crawford Mfg. Co. v. State Commissioner of Rev. & Tax, 180 Kan. 352, 304 P.2d 504 (1956) 17

Crew Levick Co. v. Penn., 245 U.S. 292 (1917) 21

F.W. Woolworth Co. v. Commissioner of Taxes, 130 Vt. 544, 298 A.2d 839 (1972) 25

F.W. Woolworth Co. v. Director of Taxation, 45 N.J. 466, 213 A.2d 1 (1965) 17, 25

Fedders Corp. v. State Tax Commission, 357 N.Y.2d 719 (1974) 17

Flint v. Stone Tracy Co., 220 U.S. 107 (1911) 20, 23

Ford Motor Company v. Beauchamp, 308 U.S. 331 (1939) 20, 23

GTE Automatic Electric v. Allpin, 68 Ill.2d 326; 369 N.E.2d 841 9

General Motors Corporation v. District of Columbia, 380 U.S. 553 (1965) 15

Great Lakes Pipeline Co. v. Commissioner of Taxation, 272 Minn. 403, 138 N.W.2d 612 (1965) 17, 25

Gulf Oil Corp. v. Morrison, 120 Vt. 324, 141 A.2d 671 (1958) 17, 25

Hamilton Management Corp. v. State Tax Com., 253 Or. 602, 457 P.2d 486 (1969) 16

Honolulu Oil Corp. v. Franchise Tax Bd., 34 Cal. Rptr. 552, 386 P.2d 480 (1953) 16

Japan Lines Ltd. v. County of Los Angeles, 47 USLW 4477 (1979) 27

John I. Hass, Inc. v. Ellis, 227 Or. 170, 361 P.2d 820 (1961) 16

Johns-Manville Products Corp. v. Commissioner of Revenue Administration, 115 N.H. 428, 343 A.2d 221 (1975) 17, 25

Maxwell Comr. v. Kent-Coffey Mfg. Co., 204 N.C. 355, 168 S.E. 397 (1933), aff'd 291 U.S. 642, 54 S.Ct. 437 (1934) 16

Mobil Oil Corp. v. Commissioner of Taxes of Vermont, U.S. Sup. Crt. Dk. No. 78-1201, jurisdiction noted May 14, 1979 11

Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943) 27

Montana Department of Revenue v. American Smelting & Refining Company, 567 P.2d 901 (Mont., 1977), Appeal Dismissed 434 U.S. 1042 (1978) 17, 25

Montgomery Ward & Co., Inc. v. Commissioner of Taxation, 276 Minn. 479, 151 N.W.2d 294 (1967) 17, 25

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) ... 15

Norfolk & Western Ry. Co. v. North Carolina, 297 U.S. 682, 688, 56 S.Ct. 625 23

Northwestern Portland Cement Company v. Minnesota, 358 U.S. 450 (1959) 15

Peck & Co. v. Lowe, 247 U.S. 165 (1918) 21, 27

Qualls v. Montgomery Ward, Supreme Court of Ark., dec'd July 2, 1979 ..... 17, 25

Sperry & Hutchinson v. Dept. of Revenue, 5 OTR 301 (1973), aff'd 270 Or. 329, 527 P.2d 729 (1974) 16, 25

State Railroad Tax Cases, 92 U.S. 575 (1875) 18

Superior Oil Co. v. Franchise Tax Bd., 60 Cal.2d 406, 386 P.2d 33 (1963) 16

U.S. Glue Co. v. Oak Creek, 247 U.S. 32 (1917) 27

U.S. Steel, et al. v. Multistate Tax Commission, 434 U.S. 452 (1978) affirming 417 F.Supp. 795 (SDNY) 4, 15, 23

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) 15, 21, 24

Wisconsin v. J.C. Penney Company, 311 U.S. 435, (1940) 15, 25

Worlitzer Co. v. State Tax Commission, 35 N.Y.2d 100, 315 N.E.2d 805 (1964) 15

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IN THE

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OCTOBER TERM, 1978

No. 78-1839

ASARCO INCORPORATED (formerly The American Smelting and Refining Company),

Appellant,

v.

IDAHO STATE TAX COMMISSION

Appellee

ON APPEAL FROM THE
SUPREME COURT OF IDAHO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Multistate Tax Commission (Commission) and the participating states, listed in the attached Brief, respectfully move for leave to file the attached Brief *Amicus Curiae* in this case. The consent of the attorney for the Appellee has been obtained. The consent of the Appellant has been requested but at the time of the writing of this motion has not been granted.

The interest of the Commission is as shown in the "Statement of Interest" section of the attached Brief. Additionally, this case concerns the constitutionality of the Uniform Division of Income for Tax Purposes Act which is part of the substantive law of all states adopting the Multistate Tax Compact. The Commission appeared as *Amicus Curiae* before the Idaho Supreme Court in this case, and the original tax audit upon which this case is based was conducted by the Commission's audit staff.

Respectfully submitted,

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Multistate Tax Commission

IN THE

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OCTOBER TERM, 1978

No. 78-1839

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Appellant,

v.

IDAHO STATE TAX COMMISSION

Appellee

ON APPEAL FROM THE
SUPREME COURT OF IDAHO

BRIEF OF MULTISTATE TAX COMMISSION AND PARTICIPATING STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

I. INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission and the participating states, listed herein, in support of Appellee's Motion to Dismiss or Affirm.

II. STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) entered into currently by 19 states as full members, including Idaho, and by 12 states as associate members.[1]

The purposes of the compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicate taxation.[2]

[1]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, Tennessee, and West Virginia. (Ninth Annual Report, Multistate Tax Commission, June 30, 1976)

[2]The constitutionality of the Compact was upheld by the United States Supreme Court in *U.S. Steel, et al. v. Multistate Tax Commission, et al.*, 434 U.S. 452 (1978), affirming 417 F. Supp. 795 (S.D.N.Y. 1976). The Court there noted that the Compact ". . . symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer."

In fulfillment of these objectives in the area of state income taxation of multistate-multinational business, Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA).[3] Its purpose is to provide for the uniform allocation and apportionment of income for state income tax purposes by those states that adopted it. It has been adopted by a great majority of the income tax states. (11th Annual Report of the Multistate Tax Commission, 1977-1978, App. B pg. 28). It applies to all classes of taxpayers (individuals, partnerships, etc.) except financial institutions and public utilities. It provides for the specific allocation or apportionment of all the income of all the included taxpayers except the personal service income of individuals. UDITPA apportions "business income" in accordance with the well-recognized three-factor apportionment formula of property, payroll and sales. "Nonbusiness income" is specifically allocated as provided for therein.[4]

Pursuant to its authority under Article VII of the Compact, the Commission approved revised uniform allocation and apportionment regulations on February 21, 1973, which implement UDITPA. Idaho and approximately 17 other states have adopted these regulations substantially in the form as adopted by the

[3]UDITPA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1957. Uniform Laws Annotated, Vol. 9A, p. 448, et seq.

[4]Section 1A of UDITPA defines "business income" as:

> [I]ncome arising from transactions and activities in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Section 1E defines nonbusiness income subject to specific allocation as "all income other than business income."

Commission.[5] These regulations embody an interpretation of the language of UDITPA.

In the instant case, the Idaho Supreme Court, in construing what constituted business income subject to apportionment under the Idaho UDITPA provisions defining business income applied a more restrictive interpretation of what constituted apportionable income thereunder, than required by the unitary apportionment decisions of this Court. It included in apportionable income, *only income from those "investments" of ASARCO which ASARCO had specifically made to expand its principal non-ferrous metals, exploration, mining, smelting and refining business which it conducted in part in Idaho.*

Notwithstanding the unequivocal holdings of this Court, ASARCO nevertheless argues that it is entitled to "separately account" for and subtract from its unitary income subject to apportionment under UDITPA the gross income from its intangible properties if certain of its specified activities associated with those properties are not located in the taxing state.[6]

What ASARCO fails to realize is that "separate accounting" ("sourcing") of income or domicillary issues

[5]Results of a survey on the Uniformity of State Laws by the State of Indiana dated February 15, 1977.

[6]ASARCO assumes in its statement of questions that it is unconstitutional for Idaho to include ASARCO's income from intangible properties in apportionable income because (1) its commercial and legal domicile is not in Idaho; (2) the payors of the dividend income are not located in Idaho; (3) its intangibles are physically located outside of Idaho; (4) its activities in regard to its intangibles are conducted outside of Idaho; and (5) the income from its intangibles is not needed to provide operating capital for its mining operations in Idaho. ASARCO does not contend that the income from its intangible properties and its intangible properties were not utilized by it in its unitary business operations both within and without Idaho. Nor does it contend that this income is not properly classified as "business income" under Section 1(a) of UDITPA.

are inconsistent with and irrelevant in determining the validity of the assignment of unitary income to a particular taxing jurisdiction by an apportionment formula. The whole purpose of the UDITPA and other apportionment formulae is to determine what income or property of a unitary trade or business can be attributable to the taxing state, irrespective of the specific situs of the property or the specific location of the income-producing activities or "sources" and expenses related thereto.

ASARCO's error can be illustrated by a brief analysis of ASARCO's "reasons for noting jurisdiction" (Jur. St., pp. 9-20), as well as its Statement of Questions Presented (Jur. St., pp. 4-5). In ASARCO's "Statement of Questions Presented," if the word "dividends" is deleted and there is substituted therefor "smelting income," it would not change the nature of the questions presented or ASARCO's argument one *iota*. This follows from the simple proposition that ASARCO conducted no smelting activities in Idaho and that such smelting activities and properties and gross receipts connected therewith are undoubtedly managed, controlled and physically located outside of Idaho and the income is received from "sources" foreign to its activities in Idaho. Thus, ASARCO is arguing that only income which is derived from its Idaho activities and utilized in its Idaho activities can be includable in apportionable income within the purview of commerce clause and due process limitations of the United States Constitution. Such argument makes no sense whatsoever.

The reason for inclusion of ASARCO's income from its smelting properties and activities and expenses re-

lated thereto in determining net income subject to apportionment to Idaho is simply because its smelting activities and properties are used in conjunction with a unitary business which it carries on in part within the state of Idaho. Exactly the same factual and constitutional considerations come into play when the question is a determination of whether income from intangible properties, whether it is dividends, interest or capital gains from the sale of stock and securities, is properly includable in apportionable income.

This is further illustrated by ASARCO's statement on page 9 of its Jurisdictional Statement that this case involves the substantial federal question of "whether a state may constitutionally tax dividends paid to a resident corporation out of foreign source earnings of nonresident corporations having no contact with the taxing state." While it is difficult to understand what ASARCO means by such an "issue," it is evident that it is predicated on the proposition that Idaho is imposing a tax on ASARCO's dividends. Idaho is no more imposing a tax on ASARCO's "dividends" than it is imposing a tax on ASARCO's income from its smelting and refining activities which are not conducted by ASARCO in Idaho.

The issue in this case, then, is not as stated under headings (1), (2) and (3), on pages 9, 14, and 18, respectively, of ASARCO's Jurisdictional Statement, namely, the constitutionality of state taxation of dividends and other income from intangible properties. The sole question at issue here is the ability of the states, within constitutional limitations, to include in apportionable income, all income from a business which is conducted both within and without the taxing

state to the extent that the income arises from transactions and activities in the regular course of the business, including income from intangible property if the acquisition, management and disposition of the property constitutes integral parts of the business.

It is important that the UDITPA provisions be interpreted to carry out the purpose of the 29 states, including Idaho, in adopting the uniform allocation and apportionment rules continued therein. This purpose is to provide for uniformity and full accountability (without duplication) in the division of income for state income tax purposes by workable and rational division of income rules.[7]

The Commission and participating states are concerned with the proposition advanced by ASARCO that dividends and other income from business related intangible property, under the United States Constitution, must be arbitrarily assigned for state income tax attribution purposes to the commercial domicile or to the location of the payors of the income, rather than to where the taxpayer utilizes these intangible properties and the income derived therefrom in conducting its unitary activities, as required by a reasonable interpretation and application of the definition of "business income" in UDITPA.

Because ASARCO's arguments have been conclusively foreclosed and rejected by prior decisions of this Court and are based on factual conclusions not supported by the record or the findings of the Idaho Su-

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[7]Prefatory note to UDITPA, Uniform Laws Annotated, Vol. 9A, p. 448; *GTE Automatic Electric v. Allpin*, 68 Ill.2d 326, 369 N.E.2d 841 (1977) and Pierce, "The Uniform Division of Income for State Tax Purposes," 35 Taxes 747 at 748 and 749 (1957).

preme Court, we respectfully submit that ASARCO has presented no substantial federal question. For this reason, as more fully set forth herein, this Court should dismiss this appeal, or in the alternative, affirm the decision below for want of a substantial federal question.

III. COUNTER-STATEMENT OF QUESTION PRESENTED.

The statement of questions presented by ASARCO is based on erroneous factual assumptions and on a misconception of the legal issues posed. (Jur. St., pp. 4-5)

The only question presented is as follows:

Are the Idaho UDITPA provisions consistent with the due process and commerce clauses of the Constitution of the United States, to the extent these provisions include in apportionable income all "business income" defined as:

> ". . . income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute integral or necessary parts of the taxpayer's trade or business operations." Idaho Code §63-3027.[8]

[8]While the Idaho definition of "business income" is not identical with the definition of "business income" contained in Section 1(a) of UDITPA, and the Idaho law employs a statutory presumption, we believe that this difference is of no constitutional significance. UDITPA defines business income as:

> ". . . income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Contrary to ASARCO's argument (Jur. St., pp. 9, 12, 21), the present case does not present the same case as is before this Court in *Mobil Oil Corporation v. Commissioner of Taxes of Vermont,* October Term, 1979, No. 78-1201.

In its Jurisdictional Statement and brief in Docket No. 78-1201, Mobil argued that ". . . There is no Connection Between its Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed" (Docket No. 78-1201; Mobil's Jur. St., p. 9; Mobils Brief, p. 9) and that "all transactions and all of Appellant's [Mobil's] activities and operations having to do with the stocks and the dividends at issue were entirely disassociated from Appellant's business in Vermont." (Ibid., p.10). While we do not believe that Mobil in Docket No. 78-1201 has sustained its burden of establishing that its dividends and other income from intangibles arose from "investments" unrelated to its Vermont business operations, activities or privileges, there can be no question in this regard on the present appeal. As set out below and held by the Idaho Supreme Court, the record in the instant case establishes a definite connection between ASARCO's stockholdings on which the dividends in question were paid and its unitary business which it conducted in part in Idaho. That being true, a fair apportionment of ASARCO's business income, including its dividends in question, to its activities within the State of Idaho raises no substantial constitutional question. If anything is settled by the decisions of this Court, it is that the unitary income of a unitary business, conducted in part in the taxing state, can be apportioned by the well recognized three-factor UDITPA apportionment formula.

IV. STATEMENT OF THE CASE.[9]

ASARCO is a multistate-multinational corporation "in the business of mining of copper and non-ferrous metals, gold, silver, copper, lead, zinc and asbestos, and in smelting and refining and selling these metals and in the sale of secondary metals." (Juris. St., p. 36)

Its "principal business in Idaho is from mining of silver; it also mines lead and zinc, operates an administrative office for its northwest mining division and sells secondary metals in Idaho." (Juris. St., p. 39)

ASARCO's ores from its Idaho mining operations are shipped to its smelters outside of Idaho for further processing. (App. Juris, St., pp. 37-38)

ASARCO was also engaged in exploration activities in Idaho which resulted in substantial development and exploration expenditures. (Rptr. Tr., p. 146-147)

ASARCO reported its income under the provisions of UDITPA on the basis that it conducted a unitary business both within and without Idaho.

ASARCO did not contend at the time it filed its Idaho income tax returns that its mining, exploration and administrative operations which it conducted in part in Idaho were not an integral part of its business overall operations conducted in part in Idaho.

In determining its taxable income for Idaho income tax purposes under UDITPA, ASARCO excluded from net income subject to apportionment to Idaho the gross amount of all its income from all its intangible properties (including the gross amount of its interest income,

[9]The facts set forth in this statement refer to the tax years 1968, 1969 and 1970 in question unless otherwise indicated.

dividend income, royalty income and income derived from gains from the disposition of stocks and other intangibles) and gross income from the rental of housing to its mining employees. Notwithstanding this exclusion ASARCO determined its net income subject to apportionment by deducting all of its expenses which it deducted for federal income tax purposes. These deductions would include all *overhead, headquarters* and *interest* expenses, as well as depletion and depreciation deductions, etc. ASARCO also included *all* of its property, payroll and sales in the denominators of the Idaho apportionment formula factors. Nor did it contend that its stock on which the dividends were paid had not been acquired and used by it in the furtherance of its unitary business operations both within and without Idaho. In fact, apart from contending that it "has sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from smelting, refining, sale of secondary metals or income from intangibles," (App. Juris. St., p. 38), ASARCO does not otherwise contend that the income in question was not used for the furtherance of its unitary trade or business both within and without Idaho.

While the Supreme Court of Idaho recognized that "in a sense all investments and investment income of a corporation may benefit a corporation's business operations in that the investments may supply additional revenue for operating the trade or business, may improve the corporation's standing and financial posture, and in general may permit the corporation to conduct its regular business activities in a way it could not absent those investments" (App. Jur. St., p. 12), it did

not, for these reasons alone, conclude that ASARCO's income in question constituted "business" income under UDIPTA. In interpreting what constitutes "business income" from intangibles subject to apportionment under the Idaho UDITPA language the Supreme Court of Idaho determined that it was necessary to further tie the stockholdings to ASARCO's unitary business.

In regard to the dividend income held to constitute "business income," the Supreme Court of Idaho, based on the facts concerning the relationship of ASARCO's business activities with that of Southern Peru Copper Corp., M.I.M. Holdings, Ltd., General Cable, Revere Copper, ASARCO Mexicana S.A. and Compania American Smelting S.A., held as follows:

> "With respect to the dividends ASARCO received from Southern Peru Copper Corp.; M.I.M. Holdings, Ltd.; General Cable; Revere Copper; ASARCO Mexicana, S.A.; and Compania American Smelting, S.A., we conclude that the record does not contain clear and convincing evidence to rebut the statutory presumption and does not support the trial court's finding that those dividends were not business income. For the years in question, ASARCO owned a controlling or at least a very substantial interest in each of these corporations. They are all engaged in businesses closely related to ASARCO's mining and smelting operations and, with the exception of M.I.M., ASARCO did a substantial amount of business with them and provided them with a variety of technical services. *The clear inference from these facts is that ASARCO's interest in these companies was not merely that of a passive investor but that this*

> *dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral and necessary part of its mining and smelting business.* (App. Juris. St., pp. 19-20; emphasis added)

In applying the same standard of what constitutes "business" income under UDITPA, the Court found (1) that various other stock investments of ASARCO did not produce business income; and (2) that ASARCO's interest income, rents, royalties and capital gains and losses constituted business income. (App. Jur. St., pp. 4-8)

The only issue in this appeal is whether the Supreme Court of Idaho has interpreted and applied the Idaho UDITPA provisions in a constitutional manner.

V. THE ARGUMENT.

ASARCO Has Presented No Substantial Federal Question Inasmuch As Section 1 (a) of UDITPA as Interpreted and Applied by the Idaho Supreme Court is Clearly Constitutional Under Repeated Decisions of this Court.

Decisions of this Court have uniformily sustained the apportionment of *all* the unitary income of a unitary trade or business by the taxing state when the trade or business is carried on in part in the taxing state.[10]

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[10] *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1896), rehearing 166 U.S. 185 (1897); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Bass, Ratcliff & Gretton v. State Tax Comm.* 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 540 (1959); *United States Steel Corp., et al. v. Multistate Tax Commission*, 434 U.S. 452 (1978); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940); *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978).

The only relevant question when an apportionment formula is challenged under such circumstances is whether the apportionment formula arrives at a reasonable result and is not shown by the taxpayer by clear and cogent evidence to reach extra-territorial income or values. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).[11]

The unitary concept or unit rule of taxation has been uniformly followed by the states under the clear mandate of controlling decisions of this Court, whether the cases involve corporate franchise, income or property taxes.[12]

This position has been uniformly supported by various commentators.[13]

The unitary concept, which is embodied in the "business income" definition contained in Section 1(a) of UDITPA, arose out of the necessity to divide a tax base attributable to multistate activities equitably among tax jurisdictions. It evolved as a judicial concept to con-

[11]In fact, this was the only constitutional issue raised by ASARCO in the Idaho Courts. It was the only constitutional issue decided by the Idaho Supreme Court. In an effort to prove that the UDITPA formula arrived at an unreasonable result, ASARCO relied solely on "separate accounting." (App. Jur. St., pp. 28-29)

[12]

California

Butler Bros. v. McColgan, 17 Cal.2d 664, 111 P.2d 3334 (1941)

Superior Oil Co. v. Franchise Tax Bd., 60 Cal.2d 406, 386 P.2d 33 (1963)

Honolulu Oil Corp. v. Franchise Tax Bd., 34 Cal. Rptr. 552, 386 P.2d 480 (1953)

Oregon

Hamilton Management Corp. v. State Tax Comm., 253 Or. 602, 457 P.2d 486 (1969)

John I. Hass, Inc. v. Ellis, 227 Or. 170, 361 P.2d 820 (1961)

Sperry & Hutchinson v. Dept. of Revenue, 5 OTR 301 (1973), aff'd 270 Or. 329, 527 P.2d 729 (1974)

North Carolina

Maxwell Comr. v. Kent-Coffey Mfg. Co., 204 N.C. 355, 168 S.E. 397 (1933), aff'd 291 U.S. 642, 54 S.Ct. 437 (1934)

Kansas

Crawford Mfg. Co. v. State Commissioner of Rev. & Tax, 180 Kan. 352, 304 P.2d 504 (1956)

New York

Worlitzer Co. v. State Tax Commission, 35 N.Y.2d 100, 315 N.E. 2d 805 (1964)

Fedders Corp. v. State Tax Commission, 357 N.Y.2d 719 (1974)

Minnesota

Associated Dry Goods Corp. v. Commissioner of Taxation, 235 N.W.2d 821 (1975), affirming per curiam Minnesota Tax Court Decision in two State Tax Reports (CCH; Minnesota) § 200-678 (May 17, 1974)

Montgomery Ward & Co., Inc. v. Commissioner of Taxation, 276 Minn. 479, 151 .W.2d 294 (1967)

Great Lakes Pipeline Co. v. Commissioner of Taxation, 272 Minn. 403, 138 N.W.2d 612 (1965)

Maine

Albany International v. Halperin, 388 A2d. 209 (1978)

Maryland

Comptroller of the Treasury, Income Tax Division v. Diebold, Inc., Court of Appeals of Maryland No. 112, Sept. Term 1976, Opinion filed Feb. 9, 1977

Michigan

Cleveland Cliffs Iron Co. v. Corporation Securities Comm., 351 Mich. 652, 88 N.W.2d 564 (1958)

Vermont

Gulf Oil Corp. v. Morrison, 120 Vt. 324, 141 A.2d 671 (1958)

F. W. Woolworth Co. v. Commissioners of Taxes, 130 Vt. 544, 298 A.2d 839 (1972)

New Jersey

F. W. Woolworth Co. v. Director of Taxation, 45 N.J. 466, 213 A.2d 1 (1965)

Montana

Montana Department of Revenue v. ASARCO, Mont. , 567 P.2d 901 (1977)

New Hampshire

Johns-Manville Products Corp. v. Commissioner of Revenue Administration, 115 N.H. 428, 343 A.2d 221 (1975)

New Mexico

Champion International Corp. v. Bureau of Revenue, 88 N.M. 411, 540 P.2d 1300 (1975)

Arkansas

Qualls v. Montgomery Ward, Supreme Court of Ark., dec'd July 2, 1979.

[13]Keesling and Warren, "The Unitary Concept in the Allocation of Income," 12 Hastings L. J. 42 (1960); Walter Hellerstein, "State Taxation in the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?" 75 Mich. L. R. 1426 (1977); Jerome Hellerstein, "Recent Developments in State Tax Apportionment and a Circumscription of a Unitary Business," XXI National Tax Journal 487; Lavelle, "What Constitutes a Unitary Business," 25 Major Tax Planning (U.S.C. Law Center Institute) 239 (1973); Dexter, "The Unitary concept in State Taxation of Multistate-Multinational Businesses," 10 The Urban Lawyer 188 (1978).

form general statutory requirements to constitutional limitations on state taxing power. It was applied where a portion of a tax base attributable to a particular state could not be determined by "separate accounting" because of the "unitary" or integrated nature of the multistate business's operation both within and without the taxing state.[14]

The "unit" rule ("unitary") concept in the apportionment of a tax base among the states was first applied by this Court in determining the *ad valorem* property tax liability of interstate utilities. *State Railroad Tax Cases,* 92 U.S. 575 (1875) and *Adams Express Co. v. Ohio State Auditor,* 165 U.S. 194 (1896), (*Adams Express, Co. I)* rehearing 166 U.S. 185 (1897) (*Adams Express, Co. II).*

These early cases recognized the unitary nature of an interstate utility system and the validity of the apportionment of the unitary value of the system.

Adams Express Co. I, supra, upheld the apportionment of the full value of interstate express companies, *including the value of their intangible property.* It found that all of the property of an interstate utility system was subject to apportionment to measure the going concern value of tangible personal property physically present in the taxing state.[15]

In *Adams Express Co. II, supra,* this Court rejected the argument that the commercial domicile had a special claim to tax the intangible properties of interstate utilities when these intangible properties were utilized

[14]An Indiana survey indicates that all income tax states apportion unitary income. *Ibid,* note 5.

by the utilities in carrying on their interstate business operations. In so doing, it posed and answered the following question concerning three-fourths of the value of Adams Express which was intangible property:

> "Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, we think, the latter." (166 U.S. 223)[16]

[15]It noted in *Adams Express Co. I:*

> "No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad, telegraph, and sleeping-car companies, to roadbed, rails, and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business — whether represented in tangible or intangible property — in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the issuance of these companies as the others." (165 U.S. 221, 222)
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> * * * * *
>
> "There is here no attempt to tax property having a situs outside of the state, but only to place a just value on that within. Presumptively, all the property of the corporation or company is held and used for the purpose of its business, and the value of its capital stock and bonds is the value of only that property so held and used.
>
> * * * * *
>
> "It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all of their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis." (165 U.S. 227)

[16]In *Adams Express II,* this Court further noted:

> "The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, and so forth; that tangible property is the only property within the State; that is must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them."
>
> "This contention practically ignores the existence of intangible property, or at least denies its liability for taxation." (166 U.S. 218)

These early "unit rule" ad valorem utility property tax cases were applied to corporate privilege and income taxes. In applying the "unit rule," to privilege taxes this Court in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) stated:

> "Nor can it be justly said that investments have no real relationship to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing with shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige." (220 U.S. at 166)

Similarly, in *Ford Motor Co. v. Beauchamp,* 308 U.S. 331 (1939) this Court again recognized that the existence of intangible properties by large multistate-multinational corporations contributed substantially to their business which they conducted in various states in stating:

> "In a unitary enterprise, property outside of the state necessarily affects the worth of the privilege within the state. Financial power inherent in possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason, it is held that an entrance fee may be properly measured by capital wherever located. The weight, in determining the value of the intrastate privilege, given the property beyond the state's boundaries, is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state." (308 U.S. at 336)

The unit rule of taxation, which included a reasonable apportionment of intangible properties and intangible values, as developed in the *Adams Express Co.* cases was first applied to taxes on or measured by net income in *Underwood Typewriter Co. v. Chamberlain, supra.* In *Underwood,* a tangible property apportionment factor was used to apportion to Connecticut manufacturing activities ". . . income upon which the corporation is required to pay a tax to the United States." (254 U.S. 117, 118) In challenging the constitutionality of the apportionment formula, the taxpayer contended that the net income included income from intangibles not connected with its Connecticut manufacturing business or properties. (254 U.S. 114-116) In disposing of the taxpayer's arguments, this Court focused its attention solely on the validity of the apportionment result.[17]

Four years later, in *Bass, Ratcliff & Gretton, Ltd. v. New York Tax Commission,* 266 U.S. 271 (1924), this Court held that the world-wide property and income of a British unitary enterprise were a necessary part of the apportionment computations in measuring the true value of its income attributable to New York. The taxpayer was found to be "a

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[17]Previously, this Court in *Peck & Co. v. Lowe,* 247 U.S. 165 (1918) had rejected the argument that a tax on net income from export sales constituted a tax on exports. In so doing, it noted that an income tax ". . . is not laid on income from exportation because of its source . . . The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus, what is taxed — the net income — is as far removed from exportation as are articles intended for export before the exportation begins." (247 U.S. 174-175) Compare *Peck* with *Crew Levick Co. v. Penn.*, 245 U.S. 292 (1917) wherein a gross receipts tax on receipts from goods sold in foreign commerce was held invalid.

British corporation, engaged in brewing and selling Bass's ale" which it imported and sold in New York City and Chicago. (id., at p. 278) It had world-wide net income of $2,185,600, but "the Company, as reported to the United States, had no net income upon which it was subject to a federal income tax." (id., at p. 279) New York imposed a 3% tax which Bass paid under protest.

On appeal, Bass contended that the tax was imposed "upon a portion of its net income derived from business carried on outside of the United States . . ." (id., at p. 280) Bass argued further that the New York tax ". . . imposes a direct burden upon its foreign commerce in violation of the commerce clause of the Constitution." (id., at p. 280) This Court decisively rejected these contentions. It held that Bass ". . . carried on the *unitary* business of manufacturing and selling ale, in which its profits were *earned in a series of transactions* beginning with manufacture in England and ending in sales in New York . . ." (id., at p. 282; emphasis added) Having found Bass to be a unitary business operation, this Court affirmed that a fair measuring of taxes due the State required inclusions of:

". . . the property of such corporations beyond its borders to 'get the *true value* of the things within it, when they are part of an organic system of wide extent' giving the local property a value *above that which it would otherwise possess* . . ." (id., at p. 282; emphasis added)

Again, in *Butler Bros. v. McColgan,* 315 U.S. 501, this Court applied the unit rule it had expressed in the *Adams Express Co.* cases and its observations in

Flint v. Stone Tracy Co., supra, and *Ford Motor Co. v. Beauchamp, supra,* in determining the validity of the apportionment result challenged in *Butler Bros.* It there found:

"One who attacks a formula of apportionment carries the distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed. See *Norfolk & Western Ry. Co. v. North Carolina,* 297 U.S. 682, 688, 56 S. Ct. 625

* * * * *

"At least since *Adams Express Co. v. Ohio,* 165 U.S. 194, 17 S. Ct. 305, this Court has recognized that the unity of use and management of a business which is scattered through several States may be considered when a State attempts to impose a tax on an apportionment basis.

* * * * *

"We cannot say that property, payroll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that *these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned from this unitary business. And no showing has been made that income unconnected with the unitary business has been used in the formula." (Emphasis added, 315 U.S. 507-508)*

In *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978), this Court stated:

"The 'unitary business' technique involves calculating a corporate taxpayer's net income on the basis of

all phases of the operation of a single enterprise (*e.g.*, production of components, assembly, packing, distribution, sales), *even if located outside the jurisdiction*. The portion of that income attributable to activities within the taxing State is then determined by means of an apportionment formula. See, *e.g.*, *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 113 (1920). (footnote 25, 434 U.S. 473; emphasis added)

* * * * *

"Individual States are free to employ the unitary-business standard. *Underwood Typewriter Co. v. Chamberlain, supra;* accord, *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n,* 266 U.S. 271 (1924)." (footnote 26, 434 U.S. 474)

The clear holding and import of the foregoing cases has in substance been codified by the allocation and apportionment rules contained in UDITPA. Thus, UDITPA defines income subject to apportionment as income derived by the taxpayer from: (1) transactions and activities in the regular course of the taxpayer's business; and (2) including income from tangible and intangible properties "if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."[18] This unitary income under UDITPA is then apportioned by the well-recognized, generally accepted three-factor formula of property, payroll and sales.

This is exemplified by the state court decisions (including the decision below) in determining what constitutes "business income" subject to apportionment under UDITPA.[19]

[18]Regulation IV. 1(a) of the Commission sets forth the following standard to determine what constitutes business income under UDITPA and thus subject to UDITPA's apportionment provisions:

> The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, nonoperating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the indentification of the transactions and activity which are the elements of a particular trade or business. In general all transactions and activities of the taxpayer which are dependent upon or contribute to the operations of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activity arising in the regular course of, and will constitute integral parts of, a trade or business.

The foregoing is a general definition of what constitutes the unitary income of a unitary trade or business as developed by judicial precedent.

[19]These cases generally hold that income under UDITPA is business income subject to apportionment if the properties and the income derived therefrom constitute part of the unitary trade or business (the subject matter of the apportionment) which is carried on in part by the taxpayer in the taxing state. *Sperry & Hutchinson Co. v. Department of Revenue,* 270 Or. 329, 527 P.2d 729 (1974); *Montana Department of Revenue v. American Smelting & Refining Company,* 567 P.2d 901 (Mont., 1977); *Albany International v. Halperin,* 388 A2d. 902 (1978); *American Smelting & Refining Company v. Idaho State Tax Commission,* 592 P.2d 39 (Idaho, 1979); and *Qualls v. Montgomery Ward & Co., Inc.,* Supreme Court of Arkansas, Docket No. 78-35 (Dec'd July 2, 1979).

Cf. *Appeal of Capital Southwest Corporation,* C.C.H. California State Tax Report, §204881 (1973); *Commonwealth v. Emhart Corporation,* 443 Pa. 397, 278 A.2d 916 (1971), cert. denied 404 U.S. 981; *Commonwealth v. Tube City Iron & Metal Co.,* 432 Pa. 600, 248 A.2d 225 (1968); *Johns-Manville Products Corp. v. Comm. of Rev. Adm.,* 343 A.2d 221 (N.H. 1975); *International Harvester v. Department of Taxation,* 332 U.S. 435 (1944); *Wisconsin v. J.C. Penney Co.,* 311 U.S. 435 (1940); *Great Lakes Pipeline Co. v. Commissioner of Taxation,* 272 Minn. 403, 138 N.W.2d 612 (1965), appeal dismissed 384 U.S. 718 (1966); *Montgomery Ward & Co., Inc. v. Commissioner of Taxation,* 276 Minn. 479, 151 N.W. 2d 294 (1967); *F. W. Woolworth Co. v. Director of Division of Taxation,* 45 N.J. 466, 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison,* 120 Vt. 324, 141 A.2d 671 (1958); *F. W. Woolworth Co. v. Commissioner of Taxes,* 130 Vt. 544, 298 A.2d 839 (1972); *Appeal of W. J. Voit Rubber Co.,* May 1947 C.C.H. Cal. Tax Rep. §202-435; and *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968,* 133 Vt. 132, 335 A.2d 310 (1975).

VI. CONCLUSION

Inasmuch as the decisions of this Court applying the unit rule or the unitary concept have consistently upheld the inclusion of the unitary properties or income of the taxpayer in the tax base subject to apportionment, and inasmuch as this Court has upheld the validity of the general three-factor apportionment formula used in UDITPA, and inasmuch as the apportionment result is deemed to be constitutional unless shown by cogent and convincing evidence to tax extraterritorial values, it is clear that ASARCO has presented no substantial federal question for disposition by this Court.[20]

WHEREFORE, it is respectfully submitted that this Court should dismiss the appeal for lack of a substantial federal question; or, alternatively, affirm without further argument the judgment and decision of the Idaho Supreme Court.

Respectfully submitted,

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[20]ASARCO, without any factual substantiation and contrary to the way it reported its income to Idaho and contrary to the express factual findings of the Idaho Supreme Court, bases its constitutional arguments on the proposition that its stock "investments," and loans from which it derived dividend, interest and capital gains income, were properties which it did not utilize in its unitary trade or business. Thus, in substance, it asks this Court to reverse the factual questions resolved by the Idaho Supreme Court in determining what income of ASARCO in question constituted business income and in detemining whether ASARCO had established by clear and cogent evidence that the apportionment results were invalid.

In addition, ASARCO predicates its arguments on various invalid assumptions which include:

1. The assumption that the inclusion of an item of income in an income base subject to apportionment constitutes an income tax on that item of income. This, of course, is not true. Apart from the application of an apportionment formula, this Court has recognized the constitutional difference between a tax on net income and a tax on gross receipts. *U.S. Glue Co. v. Oak Creek,* 247 U.S. 32 (1917); *Peck & Co. v. Lowe,* 247 U.S. 165 (1917). "Net income" is an abstract concept resulting from a host of operational events which take place within an arbitrary time frame — the tax year. When "net income" is further broken down by application of an apportionment formula to arrive at "net taxable income" under any state law, no item of income or expense can be identified in "net taxable income."

2. The assumption that dividends and interest and other income from intangibles are attributable to the underlying business activities or the domicile of the payors rather than to the business activities of the payees. Based on this assumption, ASARCO argues that the dividends from its "foreign subsidiaries" constitutes "foreign source" income. However, dividend income (as also argued by ASARCO) is attributable to its stock ownership. This follows from the single proposition that a stockholder is a distinct taxable entity apart from the corporation. *Moline Properties, Inc. v. Commissioner,* 319 U.S. 436 (1943). Since we are here concerned with only domestic income of domestic corporations which is includable in federal taxable income, it is obvious that *Japan Lines Ltd. v. County of Los Angeles,* 44 USLW 4477(decided April 30, 1979) has no application.

3. The assumption that all the business it conducted in Idaho was the operation of its mines when in fact it conducted extensive exploration and development activities. (Rptr. Tr., pp. 146-147)

4. The assumption that the commercial domicile has a special constitutional right to tax all of the income from intangible properties. ASARCO has cited no facts and there is none in the record to support this novel proposition. Also, it has cited no decision of this Court and to our knowledge none exists to support this assumption. In regard to the basic issues and considerations involved in such an assumption, see Dexter, "Taxation of Income from Intangibles of Multistate-Multinational Corporations" 29 Vand. L. Rev. 401 (1976). Even in the context of *ad valorem* property taxation as applied to movable tangible properties of interstate and international commerce, this Court in *Japan Line, supra,* rejected the domicillary (home port) rule as applied to domestic corporations. In fact, this Court's holding in *Japan Line* that the domicillary rule was applicable to state *ad valorem* property taxation of foreign owned and based instrumentalities used exclusively in international commerce was predicated on its inability to apply apportionment rules at the international level to such instrumentalities. Furthermore, this Court in *Japan Line* affirmed the principle of full apportionment to prevent undue multiple taxation of interstate commerce.

5. The assumption that the commerce clause precludes subjecting a multistate-multinational business from the risk of any duplicate taxation of a particular item of income which is includable in apportionable income. The decisions of this Court do not so hold. To the contrary, they are based on the proposition that the attribution of a unitary tax base to

a taxing state by a reasonable apportionment formula, as applied to interstate commerce, conforms to the multiple taxation restrictions of the commerce clause.

6. The assumption that it has been subject to tax by any foreign country. Nothing in the record so indicates and no such argument was advanced by ASARCO in the Idaho courts.

7. ASARCO's reliance on various tax treaties is misplaced. The United States enters into treaties to protect its citizens, residents or domestic corporations *from inappropriate taxation by foreign nations and their political subdivisions.* Treaties do not purport to determine how the United States or its political subdivisions chose to tax their own citizens, residents or domestic corporations.